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**THE ADMINISTRATION OF JUSTICE  
FROM HOMER TO ARISTOTLE**

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# THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE

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VOLUME I

Συνέχει πόλεις τὸ τοὺς νόμους σώζειν καλῶς.

—EURIPIDES



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## PREFACE

The administration of justice constituted a very vital element in the Athenian scheme of government. All officials and governing bodies and boards had more or less important judicial functions to perform. In the processes of government the courts constantly intervened in a fashion quite unknown in a modern state. In the last resort they enforced the responsibility of magistrates, passed upon proposed legislation, ratified treaties providing for reciprocity in litigation between the contracting states, and by means of the *γραφὴ παρανόμων* protected the constitution and exercised a salutary control over professional politicians.

The materials available for tracing the development of Athenian legal institutions are comparatively meager and inadequate. The main source is Aristotle's *Constitution of Athens*. The later chapters, portraying the system introduced about the middle of the fourth century, leave little to be desired. This portion of the treatise might well have served as a textbook on practice and procedure for young men desirous of becoming professional speech-writers. But when one turns to the preceding review of Athenian constitutional history for information about the earlier period, where our other sources afford the least assistance, disappointment awaits him. n

Aristotle is fully aware of the importance of Solonic-judicial reforms. Two of the three most important democratic features of the constitution which he particularly emphasizes are legal—freedom of prosecution and the appeal to the *Heliaea*. And yet he has nothing to say about the organization of the *Heliaea*, and his paragraph on the *Areopagus* is confined to vague generalities. One of the reasons for this neglect of detail may be his lack of interest in judicial history. He was chiefly concerned with the constitutional as he saw it in his own day. The story of its development is a comparatively minor matter. But indications are not lacking that reliable material for reconstructing the *πάτριος πόλις*

even if Aristotle had wished to do so, were not available. It was much discussed in the late fifth century when it became a political catch word and a party slogan. But it is extremely doubtful if even the would-be reformers knew much about it. The revolutionists of 411 B.C. were under the impression that the constitution of Cleisthenes was "not really democratical but closely akin to that of Solon" (Aristotle, *Constitution of Athens* xxix. 3), if one may judge from the amendment of Cleitophon to the decree of Pythodorus providing for a constitutional commission.

Cleisthenes was responsible for some extremely important judicial reforms. Among them, in all probability, were the reorganization of the Heliaea and the organization of the boulé of Five Hundred. But Aristotle dismisses the subject with the mention of the oath of the boulé and a reference to some "new laws."

In the age of Pericles the heliastic courts were highly organized and played an increasingly important rôle in the state. But all the information Aristotle vouchsafes is that the dicasts numbered 6,000 and received pay. One would like to know precisely what prerogatives of the Areopagus were distributed among the assembly, the boulé, and the heliastic courts. And no ancient source has a word to say about the functions of the board of Thirty appointed in 453-452 B.C. which, it seems likely, was second in importance to the thesiothetae alone. These and other omissions, such as the date of the establishment of public arbitration, would seem to indicate that Aristotle was not much interested in legal history. Or there could not have been the same lack of evidence for the fifth century as for the early period.

The work of Aristotle, however, contains so much new material that its recovery renewed and stimulated interest in Athenian judicial history. Much attention has been devoted to special topics in monographs, dissertations, and essays in journals and dictionaries of antiquities. But the attempt to trace continuously the development of the Athenian judiciary is Lipsius' "Einleitung" to *Das Attische Recht und Rechtsverfahren*. Though very brief, it is an admir-

able outline of an important phase of Athenian institutional history. Constant use has been made of it in the following pages, which are offered as a contribution to Greek judicial history.

The earlier chapters of the present volume are devoted to a detailed discussion of the origin and development of legal processes among the Greeks down through the age of the law-givers. They constitute a necessary background for a history of the Athenian judiciary, which is essentially an account of the development of the Solonian Heliæa into the highly organized dicasteries of the fourth century. The Solonian Heliæa is itself the direct descendant of the Homeric *agora*, which on occasion meted out justice to public offenders.

In the chapters devoted to the Athenian system, the main theme is the machinery employed for administering justice. But matters which belong more properly to practice and procedure have not been wholly excluded. The choice of topics to be treated in the present volume has in some cases been more or less arbitrary; but it is our intention in the near future to deal with some of the topics here omitted, as well as others in the general field of Greek judicial history.

Some of the views set forth in the following pages are more or less speculative and conjectural. In dealing with a subject where adequate evidence is lacking, one inevitably has recourse to assumptions and conjectures. As a method of procedure they have a place particularly in the investigation of institutions, provided an effort is made to control conjectures by giving due attention to antecedents in earlier practice and survivals in later practice. Institutions arise and develop most frequently by a process of evolution, and rarely disappear without leaving some trace or influence, even where revolution has intervened.

On some of the topics discussed in the following pages we have already individually published articles in *Classical Philology*, and we desire to thank the editors of this journal for permission to make use of this material. In no sense, however, have these articles been reprinted. The material contained in them has always been reorganized, amplified



brought up to date, and adapted to the needs of the present volume.

We wish to thank Professor John Adams Scott, of Northwestern University, for his critical examination of the chapter on the Heroic Age and for the helpful suggestions which his expert knowledge of Homer enabled him to offer. He is in no sense, however, to be held responsible for opinions expressed on controversial points. Thanks also are due Professor A. P. Dorjahn, of Northwestern University, for reading the first five chapters in manuscript and for various suggestions during the progress of the work. We are indebted to our colleague, Professor Carl Darling Buck, for the note on the word *ἡλιαία*, page 157.

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## CHAPTER I

### THE HEROIC AGE

In his description of the four types of kingdoms Aristotle gives the following picture of that of the Heroic Age:

There is a fourth species of kingly rule—that of the heroic times—which was hereditary and legal, and was exercised over willing subjects. For the first chiefs were benefactors of the people in arts or arms; they either gathered them into a community, or procured land for them; and thus they became kings of voluntary subjects, and their power was inherited by their descendants. They took the command in war and presided over the sacrifices, except those which required a priest. They also decided causes either with or without an oath; and when they swore, the form of the oath was the stretching out of their scepter.<sup>1</sup>

Thucydides also is describing the kingship of heroic times when he says that formerly there had been hereditary kingships based on fixed prerogatives: *πρότερον δὲ ἦσαν ἐπὶ ῥητοῖς γέρασι πατρικαὶ βασιλείαι*.<sup>2</sup> Aristotle is interested in the kingship itself rather than in the political organization of society in the Heroic Age. But from Homer it is possible to obtain a fairly complete picture of the state of affairs in early Greece. For the threefold division of society Homer uses the names which were current in later times. There was the clan (*γένος*), all the members of which claimed descent from a common ancestor.<sup>3</sup> Aside from the *γένος* there were the phratry (*φρήτρη*) and the tribe (*φύλον*), which appear only as military divisions in Homer. When the Greeks were assembled to go

<sup>1</sup> *Politics*, 1285b; cf. also his succeeding summary: "These, then, are the four kinds of royalty. First the monarchy of the heroic ages; this was exercised over voluntary subjects, but limited to certain functions; the king was a general and a judge, and had the control of religion." Jowett's translation.

<sup>2</sup> Thucydides i. 13. 1.

<sup>3</sup> *Iliad* xiii. 354. Cf. Glotz, *La solidarité de la famille dans le droit criminel en Grèce*, pp. 12 ff. According to Cary, *Cambridge Ancient History*, III, 582 ff., the *γένος* had no official importance and was not a subdivision of the phratry. In Athens it was an aristocratic organization indicative of wealth and high birth and hence had considerable power.

to battle with the Trojans in the second book of the *Iliad*, they were organized by tribes and phratries.<sup>1</sup> It has regularly been assumed, owing to the later use of the terms *φρήτηρ* and *φῶλον*, that in Homeric society the military organization was based on the political organization and that the phratry was composed of a group bound by common religious rites which developed into an organization for the defense of life and property. The tribe was a larger unit, originally including the members of one community.<sup>2</sup> However this may be, the importance of the phratry in public estimation is indicated by the Homeric line,

ἀφρήτωρ ἀθέμιστος ἀνέστιός ἐστιν ἐκεῖνος.<sup>3</sup>

At the head of the Homeric state was a chief (*βασιλεύς*); and next to him, a council composed of other less powerful chiefs, likewise called *βασιλεῖς*.<sup>4</sup> Finally there was an assembly composed of all freemen, which met irregularly to hear the plans presented to it by a chief.

The king is regularly spoken of as "Zeus-born" or "Zeus-nurtured"; and the kings of whom Homer makes mention trace their descent to a god either immediately, as in the case of Achilles, or more remotely, as in the case of Agamemnon. The obedience of the people to their kings in the first

<sup>1</sup> *Il.* ii. 362. Elsewhere in Homer *φῶλον* occurs only in such phrases as *φῶλον ἀνθρώπων*, *φῶλον γυναικῶν*, *φῶλον θεῶν*. The organization of the army in Athens in the historical period was by tribes.

<sup>2</sup> Botsford, *The Athenian Constitution*, pp. 95 ff., attributes to the tribe a much smaller part than to the phratry in the synoecism of communities later into organized political cities.

<sup>3</sup> *Il.* ix. 63.

<sup>4</sup> Myres, *Political Ideas of the Greeks*, pp. 64 ff., argues plausibly that the Homeric poems describe the conditions and customs of the thirteenth and twelfth centuries. In the following discussion no attempt will be made to distinguish between earlier and later portions of Homer. The fully developed Homeric society will be described. Fanta's entire argument about the Homeric state is used to prove earlier and later portions of the two poems (*Der Staat in der "Ilias" und "Odyssee"*). Bréhier, *Rev. historique*, LXXXV, 1 ff., differentiates between the age of (1) the early *Iliad* and (2) the later portions of the *Iliad*, and the *Odyssey*. According to his theory, the quasi-feudal age of the earlier period, when the state was not yet in existence and the social organization depended only on fealty to a chief and his family, gives way to an organized aristocracy of the later period.

instance was probably due to this reputed divine descent. Each chief was suzerain to a group of lesser chiefs, who, in their turn, were suzerain to a group of subordinates. So a chief is described as more or less kingly according as he had more or fewer *basileis* subordinate to him.<sup>1</sup> For instance, Agamemnon is described as more kingly (*βασιλεύτερος*) than Achilles.<sup>2</sup> The kingship was in general hereditary, although a family might be set aside and another king chosen.<sup>3</sup> Since this was the case, a king had to have many personal qualities aside from his wealth in order to maintain his authority. Different qualifications are mentioned as desirable,<sup>4</sup> in connection with various Homeric chiefs; for example, good generalship, eloquence, wise counsel, superiority in athletics, proficiency in the arts and crafts. The king might, of course, lack some of these qualities. Agamemnon, for instance, showed no prowess in athletics. When a king became old, he could be represented in war by his son, as in the case of Peleus and Achilles. The outward sign of the kingship was the scepter, which was inherited and which was carried by the king in council. The scepter of Agamemnon is represented as being of divine workmanship.<sup>5</sup> The revenues of the king came from various sources. The people gave him land, called his *τέμενος*. In addition, frequent gifts were expected from his people; and in sumptuous public entertainments for his guests the people were often called upon to

<sup>1</sup> So the chief king might be described as *βασιλεύτατος*, *Il.* ix. 69. Cf. Glotz, *La cité grecque*, pp. 45 f. Nilsson, "Das Homerische Königtum," *Sitzungsberichte d. preuss. Akad. d. Wissenschaften*, Phil. Hist. Kl. 1927, p. 27, says that the royal power in the *Iliad* consists primarily in military command. When the great military enterprises ceased, the lesser chiefs were no longer so closely connected with the king but became more independent (p. 37).

<sup>2</sup> *Il.* ix. 160. Cf. Glotz, *Solidarité*, p. 12. The wealth of the chieftains was doubtless gained by force. Cf. Moreau, "Les assemblées politiques d'après l'*Iliade* et l'*Odyssée*," *Rev. d. études grecques*, VI, 236 ff.

<sup>3</sup> Cf. the threat to remove Telemachus from the succession in Ithaca, *Od.* i. 386; cf. xi. 174 ff.

<sup>4</sup> The good king is like a gentle father to his people (*Od.* v. 7 ff.). Helen describes Agamemnon as both a good king and a good warrior (*Il.* iii. 179).

<sup>5</sup> Cf. *Il.* ii. 101 ff.

contribute.<sup>1</sup> Further, from war and from marauding expeditions the largest share of the booty went to the king.<sup>2</sup> In the loosely organized state of Homeric society there were many duties which the king had to perform personally. He had to provide for the entertainment of guests and for the protection of guests and suppliants. His earliest function as village chief in the earliest stage of society was doubtless the superintendence of the sacrifices for the community. This is one of his important functions in Homer.<sup>3</sup> The king had charge of foreign relations, and it was he who made official visits to other cities and negotiated with them.<sup>4</sup> The arbitral and judicial functions of the king were important.<sup>5</sup> In war the king was the leader, and he had absolute authority. This is shown most strikingly in the case of Agamemnon, the chief leader of the Greek forces before Troy. Nobody questioned his authority, and disrespectful criticism of him was viewed with disfavor even by the common people.<sup>6</sup> The chief also had the duty of avenging those of his followers who were slain in battle. In this case he stood in the position of a relative to his followers. This duty involved also the general

<sup>1</sup> Cf. Odysseus at the court of Alcinous, *Od.* viii. 390 ff.; cf. also xix. 197.

<sup>2</sup> E.g., the gift of more goats to Odysseus in the Cyclops adventure (*Od.* ix. 160).

<sup>3</sup> Cf. Agamemnon in charge of the sacrifice before the duel of Paris and Menelaus, *Il.* iii. 271 ff.

<sup>4</sup> Cf. the visit of Odysseus and Menelaus to Troy prior to the Trojan War, *Il.* iii. 205 ff.

<sup>5</sup> Fanta, *op. cit.*, p. 58, says that the king never appears as the real or single judge in the *Iliad* or the *Odyssey*. Arete is represented as settling the disputes even of men (*Od.* vii. 74). There is no doubt that this is viewed as a surprising situation. Arete's capacity here is obviously that of arbitrator. Cf., on the judicial powers of the king in the Homeric period, Glotz, *Études sociales et juridiques sur l'antiquité grecque*, p. 5, and Bréhier, *Rev. historique*, LXXXIV, 30, who says that the king does not draw judicial power from Zeus, but guards the customs of the city and this only in religious and military spheres, outside of which he has no judicial authority. Cf. p. 32: "Tout ce qui est dans les états modernes du ressort de la justice criminelle ou des tribunaux civils était tranché souverainement par un accord entre les particuliers. Cet accord n'était souvent que le résultat d'une longue lutte qui pouvait ensanglanter la cité pendant plusieurs générations, etc." Cf. also, *ibid.*, LXXXV, 21.

<sup>6</sup> Cf. the case of Thersites, *Il.* ii. 212 ff.

protection of his followers at all times.<sup>1</sup> Absolute as the authority of the king would appear to be from this summary, it is nevertheless not to be supposed that there were no limitations on his power. In the first place he would not venture to disturb the time-honored customs and privileges of the people. And a more definite check is to be found in the advice and opinions of the Council of Elders and the general assembly.<sup>2</sup>

The Council of Elders (γέροντες) was composed of the petty chiefs. It is probable that the number of the members of the council was not fixed but depended on the number that the king wanted to consult.<sup>3</sup> Obviously the council of the most prominent chieftain in a community would be composed of the foremost men. Before Troy the council was composed of all the other leaders together with Agamemnon as chief. Of course, many of these chiefs in their own communities at home were scepter-bearing kings, but in the army they gave way to Agamemnon as the most kingly. These lesser chieftains also were reputed to be of divine origin. In general they exhibited the same characteristics, that is, they were good generals, orators, and counselors. The ostensible function of the boulé was to act as a consultative and advisory body. The king seems frequently to have laid his plans before the boulé before they were brought before the general assembly. Since the king selected his council, he naturally was the one who summoned it. The council had no actual power to restrict the authority of the king, but in practice it must have had considerable influence in this regard. He must often have listened to the wisdom of the boulé and have accepted it, even though he had to disregard his own plans. On the other hand, there was nothing to hinder him from carrying through his own designs even if the whole council disapproved.<sup>4</sup> He took his counselors' opinions under con-

<sup>1</sup> Cf. Fanta, *op. cit.*, pp. 64 ff.

<sup>2</sup> Cf. Nillson, *op. cit.*, p. 28.

<sup>3</sup> Cf. Moreau, *op. cit.*, pp. 236 ff.

<sup>4</sup> Moreau, *op. cit.*, p. 249. The king might bring any matter before the council but was not forced to submit any.



sideration, but himself made the final decision.<sup>1</sup> With Botsford it seems fair to say that the strength or weakness of the *boulé* depended very largely on the character of the king.<sup>2</sup> The members of the council are called *βουλευφόροι*.<sup>3</sup>

The popular assembly was composed of all adult free male members of the community. It cannot be assumed that the right to call an assembly belonged to the king alone. No one questioned the authority of Telemachus to call a meeting to deal with the suitors; and yet it is certain that this point would have been raised by the suitors, who were anxious to prevent the intervention of the people, if the sole right to summon the assembly belonged to the king.<sup>4</sup> At a later time Penelope proposed to have Laertes appeal to the people;<sup>5</sup> and the suitors themselves, after their attempt to waylay and kill Telemachus, were in dread of another appeal to the people which might result in their banishment.<sup>6</sup> Both Nestor and Odysseus expressed surprise that the people did not interfere to protect Penelope and Telemachus.<sup>7</sup> Aegyptius, the father of one of the suitors but a friend of Odysseus, clearly intimates that anyone who had important news might summon a meeting of the people:

<sup>1</sup> Cf. Agamemnon's taking of Briseis and the straits in which his act left the army (*Il.* i. 318 ff.). On the other hand, he yielded with regard to Chryseis. Another instance is the treatment of Polydamas by Hector as a result of his opposition, although Hector was obviously in the wrong (*Il.* xviii. 285 ff.).

<sup>2</sup> *Op. cit.*, p. 118.

<sup>3</sup> *Il.* i. 144.

<sup>4</sup> *Od.* ii. 6 ff.; cf. iii. 137; xvi. 361 ff.; also *Il.* i. 53; xix. 34. It is surprising to learn that the assembly of the second book of the *Odyssey* is the first meeting since the departure of Odysseus. Fanta, *op. cit.*, p. 87, regards this as proof that the king regularly summoned the assembly. There is a strong temptation to regard the statement of Aegyptius as a rhetorical exaggeration. Moreau, *op. cit.*, p. 214, remarks: "Il est sans doute extraordinaire qu'Ithaque ait passé vingt ans sans agora, et si j'osais, je dirais volontiers que je n'en crois rien." Finsler, "Das Homerische Königtum," *Neue Jahr. für Phil.*, XVII, 321, sees, in the meeting, "die Wiederkehr geordneter Zustände." This seems to be correct. The interests of the suitors had made it desirable that there should be no meetings.

<sup>5</sup> *Od.* iv. 735 ff. There is no indication that Laertes had special authority during the absence of Odysseus, whose representative was Mentor (*Od.* ii. 225 ff.).

<sup>6</sup> *Od.* xvi. 375 ff.

<sup>7</sup> *Ibid.*, iii. 214 ff.; xvi. 95 ff.

νῦν δὲ τίς ὧδ' ἡγείρε; τίνα χρεὼν τόσον ἱκεῖ  
 ἢ ἐνέων ἀνδρῶν, ἢ οἱ προγενέστεροί εἰσιν;  
 ἢ ἐτιν' ἀγγελλῆν στρατοῦ ἐκλυεν ἐρχομένοιο,  
 ἢ ἐτι δῆμον ἄλλο πιφαύσκεται ἢ δ' ἀγορεύει;<sup>1</sup>

It would seem, then, that the right to summon an assembly was open to all, both chieftains and common people.<sup>2</sup> But not always was an assembly formally summoned. It was the natural instinct of Greeks to resort to the place of assembly, even without special summons, when anything happened that concerned the whole community. Thus the Ithacans, on hearing of the slaughter of the suitors, assembled of their own accord in the agora.<sup>3</sup> They went there automatically since it was the one certain place for information and discussion. It was the common daily meeting place.<sup>4</sup>

Formal meetings were held at irregular intervals. After Telemachus called the people to assembly, Aegyptius is represented as saying that the assembly had not met in Ithaca since the departure of Odysseus twenty years before.<sup>5</sup> But the assembly could be summoned whenever there was a matter to put before it. For example, at the beginning of the second book of the *Iliad* Agamemnon dispatches heralds to call the people to assembly so that he may make trial of their spirit. The Achaeans assemble with the utmost eagerness and promptness. Evidently, assembly meetings were of great interest to the army.<sup>6</sup> Achilles calls a meeting of the people to discuss the plague.<sup>7</sup> Doubtless he sent out heralds just as Agamemnon did. Alcinous calls an assembly of the Phaeacians to inform them of the arrival of a stranger whom they are to entertain and afterwards to escort home.<sup>8</sup> All

<sup>1</sup> *Ibid.*, ii. 28 ff.

<sup>2</sup> Cf. Moreau, *op. cit.*, p. 213, and Finsler, *op. cit.*, p. 327.

<sup>3</sup> *Od.* xxiv. 420.

<sup>4</sup> This may be inferred from the remark about Achilles that during the period of the wrath he did not frequent the man-ennobling assembly (*Il.* i. 490). This is better than to suppose that the called assemblies were so frequent that his absence during the few days of his wrath was a matter for remark.

<sup>5</sup> *Od.* ii. 26 f.

<sup>6</sup> *Il.* ii. 86 ff.

<sup>7</sup> *Ibid.*, i. 54.

<sup>8</sup> *Od.* viii. 4 ff.

three of these meetings are called for the purpose of giving information to the people, and the first two particularly for getting the reaction of the people to the subject in hand. The assembly afforded a means of communicating information and orders to the people, who were eager for news and could always be counted upon to assemble readily. The person who called the assembly was not necessarily the one who introduced the business before it.<sup>1</sup> The consultative and deliberative character of the assembly develops later, but is firmly established in the time of Homer, as evidenced by the case of the assembly called by Achilles wherein various people gave their opinions with regard to the plague and the course to be followed. That the speakers were not necessarily chieftains is illustrated by the case of Thersites, who was apparently a common soldier—the only one named in the *Iliad*.<sup>2</sup> On more than one occasion he had ventured to criticize the chieftains in the assembly. Apparently, then, after the business had been brought before the meeting, anyone had a right to speak in approbation or criticism. The man of the common people, however, had to be careful of his words, for the chieftains did not take kindly to criticism from their inferiors. It is noteworthy that nobody questioned the right of Thersites to speak; the criticism is directed altogether against what he says.

Fanta<sup>3</sup> argues that there was a second assembly, called *θῶκος*, in which the king, surrounded by his chiefs, gave orders to the people or informed them about public matters. There was no opportunity for discussion. Some scholars regard the word as another designation of the council of chiefs, the *βουλή*.<sup>4</sup> Moreau<sup>5</sup> rejects both of these theories on the ground that *θῶκος* means merely "sitting"; hence it may refer to any seated assembly, and therefore should not be regarded as having any such exact meaning as either of these two

<sup>1</sup> Cf. *Il.* x. 203. For some examples of topics treated by the assembly, cf. Moreau, *op. cit.*, pp. 227 ff.

<sup>2</sup> *Il.* ii. 212 ff.

<sup>3</sup> *Op. cit.*, p. 77.

<sup>4</sup> Buchholz, *Die homerischen Realien*, Vol. II, Part I, Section I, § 4; Glotz, *La cité*, pp. 54 and 59.

<sup>5</sup> Moreau, *op. cit.*, pp. 209 f.

theories would attribute to it, especially in view of the lack of detail in any of the passages in which *θῶκος* occurs. At any rate, there is no need to suppose that there was a third assembly.<sup>1</sup>

In this period, deliberative, executive and judicial functions were not yet distinct. The political organization of the Homeric state had developed from such patriarchal communities as the one described in the case of the Cyclopes.<sup>2</sup> The authority of the father under such a system had developed into the authority of the king in the Homeric state. Naturally there are found in Homer no laws in the sense in which the Xenophontic Pericles defined them: πάντες γὰρ οὗτοι νόμοι εἰσὶν οὓς τὸ πλῆθος συνελθὼν καὶ δοκιμάσαν ἐγραψε φράζον ἃ τε δεῖ ποιεῖν καὶ ἃ μὴ.<sup>3</sup> But there were, nevertheless, definite ideas of ἃ τε δεῖ ποιεῖν καὶ ἃ μὴ, though they had not yet been formulated in codes and constitutions. And the notion of orderliness and of obedience to the prevailing standards of right and justice was expressed by such words as *εὐνομία*, *εὐηγεσίη*, and *εὐδικίη*.

The *θέμιστες* were the nearest approach to laws. Strictly speaking, they were pronouncements of the king indicating in an authoritative fashion what was right and proper (*θέμις*) in a particular set of circumstances. A *θέμις* was given only to properly qualified men, and to them it transmitted the pleasure and advice of the gods.<sup>4</sup> Such men were the kings, of course. The king held a scepter, a hereditary symbol of power; he acquired communion with the gods through ritual acts, and he summoned meetings of the whole people before whom he made known his decisions.<sup>5</sup> It will be seen from

<sup>1</sup> For the meaning of the word *θῶκος* and the passages in which it occurs, cf. Ebeling, *Lexicon Homericum*, s.v.

<sup>2</sup> Vinogradoff, *Outlines of Historical Jurisprudence*, Vol. II: *The Jurisprudence of the Greek City*, p. 1.

<sup>3</sup> Xen. *Mem.* i. 2. 42.

<sup>4</sup> Maine, *Lectures on the Early History of Institutions*, p. 35: "Among the Achaeans of Homer the chief has ceased to be priest, but he is still judge; and his judicial sentences, *θέμιστες*, or 'dooms,' however much they may be drawn in reality from preexisting usage, are believed to be dictated to him from on high."

this that originally all decisions were regarded as divinely inspired, but in the Homeric period the notion of a divine source had largely disappeared.<sup>1</sup> None of these inspired judgments is recorded in the poems.

Along with *θέμις*, *δίκη* shared the general idea of justice, and is used to supplement the Homeric legal vocabulary. *δίκη* strictly represents the application by the human agent of the *θέμις*, which comes from the gods. Since his application may be wrong, there being a multiplicity of *θέμιστες*, it is possible to speak of crooked judgments (*σκολιαι θέμιστες*). The particular *θέμις* which fits a particular case has not been applied, but some other *θέμις* which does not fit. Glotz<sup>2</sup>

<sup>1</sup> Cf. Gilbert, *Beiträge zur Entwicklungsgeschichte des griechischen Gerichtsverfahrens*, p. 463.

<sup>2</sup> *Solidarité*, pp. 21 ff. He sees in *θέμις* family law of a supernatural and mysterious origin, and in *δίκη* custom which regulates interfamily relations, also of divine origin but less mysterious in its workings than *θέμις*. Cf. *Études*, pp. 3 ff. For the dependence of law on religion, cf. *ibid.*, pp. 1 ff. Sandys discusses the two words as follows (*Encyclopaedia Britannica*, article "Greek Law," p. 501): "Diké (*δίκη*), assigned by Curtius (*Etym.* 134) to the same root as *δίκονυμι*, primarily means 'a way pointed out,' a 'course prescribed by usage,' hence 'way' or 'fashion,' 'manner' or 'precedent.' In the Homeric poems it sometimes signifies a 'doom' of law, a legal 'right,' a 'lawsuit'; while it is rarely synonymous with 'justice,' as in *Od.* xiv. 84, where 'the gods honor justice.'

"Various senses of 'right' are expressed in the same poems by *themis* (*θέμις*), a term assigned (*ib.* 254) to the same root as *τίθημι*. In its primary sense *themis* is that which 'has been laid down'; hence a particular decision or 'doom.' The plural *themistes* implies a body of such precedents, 'rules of right,' which the king receives from Zeus with his sceptre (*Il.* ix. 99). *Themis* and *diké* have sometimes been compared with the Roman *fas* and *jus* respectively, the former being regarded as of divine, the latter of human origin; and this is more satisfactory than the latest view (that of Hirzel), which makes 'counsel' the primary meaning of *themis*."

Ehrenberg, *Die Rechtsidee im frühen Griechentum*, rejects, as does Hirzel (*Dike, Themis und Verwandtes*), both of the etymologies given above. *θέμις* he assigns to the root *θεμ-* as found in such words as *θέμεθλα*, *θεμελία*, and asserts that the word originally meant "hill," then "the holy hill," then the chthonic deity dwelling in the hill, then the oracle, and finally the heavenly command. Consequently the word signified the command of Zeus and was extended to the commands of kings and judges (pp. 41 ff.). *δίκη* is connected with *δικαίω* and means "a throw," signifying the cast of a vote which decides a dispute (pp. 70 ff.). On the two words, cf. also E. Weiss, *Griechisches Privatrecht*, I, 19 ff.; Steinwenter, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte*, pp. 32 ff.; Meyer, *Geschichte des Altertums*, II, 82 f.; Bréhier, *Rev. historique*, LXXXIV, 30; Hirzel, *op. cit.*, pp. 53, 94; Maine, *Ancient Law*, pp. 4 f.; Finsler, *op. cit.*, p. 329. For examples of *θέμις* and *δίκη*, cf. Myres, *op. cit.*, pp. 126 ff. and 169 ff.

explains the relationship of the two words by saying that *θέμιστες* are inspired, spontaneous judgments while *δίκαι* refer to judgments which are based on custom. The abstract idea of justice is expressed not by *θεμιστοσύνη* but by *δίκη*. And a person who refuses to do what is right is *ἀθέμιστος*; but a righteous man is *δίκαιος*, not *θεμιστός*. *Θεμιστεύω*, in the sense of "pronounce judgment," occurs, but *δικάζω* is the more common word. *Κρίνω* is also used of the exercise of judicial functions, in such phrases as *κρίνωσι θέμιστας*.

Crimes and criminals are unknown to Homer.<sup>1</sup> The conception of crime as a wrong which was a menace to society was not yet formulated, though it is dimly foreshadowed in the feeling of abhorrence for the fomenter of civil strife so well voiced by Nestor:

ἀφρήτωρ ἀθέμιστος ἀνέστιός ἐστιν ἐκείνος  
ὃς πολέμου ἔραται ἐπιδημίου ὀκρυβέντος.<sup>2</sup>

The administration of justice, then, necessarily was largely an informal matter in Homer, carried out mainly by the two parties involved, whom we should call the prosecutor and the defendant. The commonest method of obtaining redress was probably by self-help. In modern criminal law, self-help in the form of self-defense against aggression plays an important rôle subject to certain restrictions.<sup>3</sup> But in the Homeric age there were no restrictions upon the exercise of self-

<sup>1</sup> Levi, *Delitto e Pena nel Pensiero dei Greci*, p. 38, finds one exception: "Un solo tipo di degenerato, come direbbesi ora, ricorda l'Iliade: Tersite." But Thersites cannot fairly be called a criminal.

<sup>2</sup> *Il.* ix. 63 f.

<sup>3</sup> Anyone may resist attacks upon himself or his property. But the law requires that the resistance shall not be more than is sufficient for the purposes of self-defense; for the prevention of a wrong, not its redress, is the object of self-defense. But in the case of certain wrongs the common law allows true remedial self-help. One may expel a trespasser, retake goods of which he is the rightful owner, or abate a nuisance. So far as assisting another to defend himself is concerned, it is certain that a person may always defend those whose relation to him implies protection. It has even been held that a man may defend anyone; but his right to assist is no greater than the other's right to defend himself. In practice these rights are materially restricted by the prohibition against carrying weapons. The example of Sir Frederick Pollock is followed in using the English equivalent of the expressive German *Selbsthülfe*. The distinction between self-defense and self-help which he points out has no application here (*The Law of Torts*, p. 181).

help save such as were imposed by the individual's own weakness. The general custom of carrying arms greatly facilitated recourse to this method of obtaining redress. Relatives and friends were always expected to espouse the cause of the injured. Even wrongdoers could count on the assistance of their kinsmen. Odysseus, in his character of Cretan refugee, wondered why Telemachus was not aided in his troubles by his brothers:

οἷσί περ ἀνὴρ  
μαρναμένοισι πέποιθε, καὶ εἰ μέγα νείκος ὄρηται.<sup>1</sup>

And later, disguised as a beggar, he said to the suitors, "Many an infatuate deed I did, giving place to mine own hardihood and strength, and trusting to my father and my brethren."<sup>2</sup> Within his own household the master punished his servants even to the extent of inflicting death.<sup>3</sup> And, like the Cyclopes, each man *θεμιστεύει παιδων ἢδ' ἀλόχων*.<sup>4</sup> It was the duty of the father to avenge the wrongs of those who were under his protection, including the servants.<sup>5</sup>

There are various specific cases in Homer in which the injured party sought redress by self-help. For instance, adultery, seduction, or rape was punished by the husband or nearest relative in the case of a free woman, by the master in the case of a slave. It is probable that Aegisthus' adultery with Clytemnestra is regarded as aggravating the murder of Agamemnon, and his death at the hands of Orestes is an expiation of the seduction as well as of the murder.<sup>6</sup> That the punishment would have been so severe if the sole fault of Aegisthus had been adultery is doubtful. It is clear that the injured relative might exact a fine from the adulterer, as

<sup>1</sup> *Od.* xvi. 97 f.

<sup>2</sup> *Ibid.*, xviii. 139 f.

<sup>3</sup> Odysseus punished with death the goatherd and faithless maidservants (*Od.* xxii. 457 ff.).

<sup>4</sup> *Od.* ix. 114 f. Cf. *Il.* ix. 447 ff., where Amyntor curses his son and drives him into banishment for debauching his concubine.

<sup>5</sup> One of Odysseus' charges against the suitors was that they had debauched the female servants.

<sup>6</sup> *Od.* i. 35 ff.

Hephaestus did in the lay of Demodocus.<sup>1</sup> Anteia, the wife of Proetus, falsely accused Bellerophon of improper proposals and insisted that her husband should slay him. Accordingly Proetus took steps to compass his death by guile after banishing him.<sup>2</sup> The fact that Proetus sought to bring about his death in such a roundabout fashion strongly suggests that slaying was not the customary punishment for adultery in Homeric Greece and was not considered justifiable.<sup>3</sup> On the other hand, Proetus may have resorted to a trick through fear of the power of Bellerophon. Amyntor punished his son Phoenix for debauching his concubine by cursing and banishing him.<sup>4</sup> One of the explicit charges which Odysseus made against the suitors before he proceeded to slay them was *δμῶησιν δὲ γυναῖξι παρεννάεσθε βιαίως*. This amounts to rape if, indeed, *βιαίως* is to be taken literally, but it probably means merely "in defiance of decency,"<sup>5</sup> for, in view of the fact that these women are afterward punished for unchastity, one should not look for the precision of an Athenian indictment in Odysseus' charge. The conduct of both suitors and servants was an intolerable insult to the master and called for redress.<sup>6</sup>

Robbery in the form of cattle-lifting and piracy was extremely common. Against piracy, the individual, even when aided by his friends, had but slight means of protection. Both piracy and cattle-lifting on a large scale were matters for the community as a whole to redress. Against ordinary steal-

<sup>1</sup> *Ibid.*, viii. 266 ff. Glotz, *Solidarité*, p. 383, finds in the passage a similarity to the Gortyn code which makes provisions for pecuniary settlement with the injured husband. Vinogradoff, *op. cit.*, p. 234, deals with the case at some length. The whole transaction is explained as "the substitution of a convention with Poseidon for the convention with Ares, as originally proposed by Poseidon." Treston, *Poine*, p. 58, uses this case to prove that there was in Homeric times among the Pelasgians a distinction between cases in which slaying was justifiable and those in which it was not. The suggestion that there was a prescribed *μοιχάγρια* renders it likely that the killing of an adulterer was not justifiable. Cf. Gernet, *Rev. d. études grecques*, XXX (1917), 249 ff.; Calhoun, *The Growth of Criminal Law in Ancient Greece*, pp. 62 ff. and 69 ff.

<sup>2</sup> *Il.* vi. 160 ff. Cf. Treston, *op. cit.*, p. 59.

<sup>3</sup> Cf. Treston, *op. cit.*, p. 58.

<sup>4</sup> *Il.* ix. 454 ff.

<sup>5</sup> *Od.* xxii. 37.

<sup>6</sup> *Ibid.*, xxii. 418.



ing a man had some chance of protecting himself. If, under cover of mist or darkness, his sheepfolds or herds were raided, he might trace the lost animals and seek to recover them.<sup>1</sup> But the mere finding of stolen animals would not suffice if the robber who operated by stealth was prepared to resort to force. Iphitus lost his life in trying to recover some stolen horses from Heracles.<sup>2</sup> But the vigilant owner might surprise the thief in the act, and men were not infrequently wounded in protecting their cattle and sheep.<sup>3</sup>

Self-help in another form in a case akin to robbery is seen in the action of Achilles after the taking of Briseis.<sup>4</sup> Realizing his inability to recover Briseis by force, he refrained from battle. The subsequent losses of the Greeks compelled Agamemnon not only to offer to return Briseis but also to add many valuable gifts.

There is an intimation of self-help in Achilles' impulse to slay Agamemnon at the first suggestion of the taking of Briseis.<sup>5</sup> His desire was overruled by Athena's timely intervention. This situation arose in the midst of a violent quarrel between Achilles and Agamemnon. Assault and battery arising out of disputes and quarrels of various kinds must have been of common occurrence among men who habitually carried arms. For example, a quarrel about boundary stones, such as is described in a simile of the *Iliad*, might easily lead to a personal encounter.<sup>6</sup> Threats of violence no doubt often caused men to refrain from insisting on their rights.<sup>7</sup>

It has been observed that the redress sought by the injured person included not merely the restitution of property destroyed, stolen, or withheld, but also substantial damages.<sup>8</sup>

<sup>1</sup> *Il.* iii. 10 f. Autolycus, the maternal grandfather of Odysseus, was a skilful thief (*Od.* xix. 396).

<sup>2</sup> *Od.* xxi. 22 ff.

<sup>4</sup> *Il.* i. 320 ff.

<sup>3</sup> *Ibid.*, xvii. 471 ff.

<sup>5</sup> *Ibid.*, i. 188 ff.

<sup>6</sup> *Ibid.*, xii. 421 ff.; cf. the fight between Irus and Odysseus, *Od.* xviii. 1 ff.

<sup>7</sup> Laomedon is said by threats of violence to have defrauded Apollo and Poseidon of their wages (*Il.* xxi. 435 ff.).

<sup>8</sup> Such damages were known as *τιμή*, *πῶλη*, and more specifically *μοχλῆρτια*. Cf. Ferrini, *Quid conferat ad iuris criminalis historiam Homericorum Hesiodorumque*

The suitors offered to make terms on this basis; and the Trojans agreed to return Helen and her treasures, together with suitable damages, if Menelaus slew Paris in the duel.<sup>1</sup> To these examples cited by Lipsius may be added the offer of Antilochus<sup>2</sup> to pay reasonable damages as well as to restore the prize he wrongfully won from Menelaus in the chariot race. When the suitors proposed that Telemachus send his mother back to her father, he refused to dismiss her against her will, partly because her dowry would have to be restored, together with a substantial sum in the way of damages. It is true that the words *κακὸν δέ με πόλλ' ἀποτίνειν* 'Ἰκαρίῳ may refer to the restitution of the dowry only; but the next line, *ἐκ γὰρ τοῦ πατρὸς κακὰ πείσομαι*, seems to indicate that more than mere restitution is contemplated.<sup>3</sup> In effect, the wager in the trial scene and the *μοιχάγρια* in cases of adultery amount to damages.<sup>4</sup>

Of self-help in obtaining redress for the killing of relatives there is a number of instances. Thirteen homicides are mentioned apart from the slaying of the suitors and of the followers of Aegisthus and Agamemnon.<sup>5</sup> The typical wanderer from his native country is the fleeing homicide,<sup>6</sup> and the typical trial-scene pictured on the shield of Achilles arises out of a homicide. There is no trace in the poems of the later conception that homicide involves the pollution both of the

*poematum studium*, p. 17. Cf. the Hesiodic use of *ἀμοιβή*, *Works and Days*, 333. On the question of *πρωή*, cf. Lipsius, *Das Attische Recht*, pp. 7 ff.

<sup>1</sup> Cf. the version preserved by Herodotus (ii. 118) according to which an embassy under Menelaus demanded the return of Helen and the stolen property as well as τῶν ἀδικημάτων δίκας. Cf. *Il.* iii. 205 ff. for the embassy.

<sup>2</sup> *Il.* xxiii. 591 ff.

<sup>3</sup> *Od.* ii. 132 ff. There is a possibility that τοῦ πατρὸς may refer to Telemachus' own father. At any rate, the words πόλλ' ἀποτίνειν suggest a penalty. Lipsius, *op. cit.*, p. 10, n. 29, thinks the dowry alone is in question. Cf. *Il.* ix. 634, where the words are used of paying blood-money.

<sup>4</sup> Cf. *infra*, pp. 31 ff. Fanta, *op. cit.*, p. 84, wrongly regards πείραρ as referring to the deposit (*Il.* xviii. 501).

<sup>5</sup> *Od.* iv. 536.

<sup>6</sup> *Il.* xxiv. 480. When Odysseus desires to conceal his identity and account for his wandering from Crete, he pretends that he slew a man (*Od.* xiii. 259).

slayer and of those who associated with him.<sup>1</sup> Eumaeus, the swineherd, comes close to this conception, so far as the slayer himself is concerned. The disguised Odysseus had prophesied that Eumaeus' master was on the point of returning, and he offered to permit Eumaeus to slay him if the prophecy should not be fulfilled. Eumaeus refused the wager saying:

Aye, stranger, so should I indeed win fair fame and prosperity among men both now and hereafter, if I, who brought thee to my hut and gave thee entertainment, should then slay thee, and take away thy dear life. With a ready heart thereafter should I pray to Zeus, son of Cronos.<sup>2</sup>

The suitors even propose to seek the counsel of the gods regarding the contemplated murder of Telemachus.<sup>3</sup>

Outside of the circle of the dead man's kinsmen and friends,<sup>4</sup> there is no indication of any popular sentiment against ordinary homicide. Odysseus, in his character of Cretan refugee, had told a tale to Eumaeus in which he represented himself as the slayer of the son of Idomeneus. It would be hard to imagine a more cowardly murder than this. And yet Eumaeus receives the supposed murderer with all the respect due a stranger in accordance with the prevailing customs.<sup>5</sup> Several homicides are mentioned who were living as honored members of communities to which they had come as exiles. The slaying of parents, however, met with universal condemnation. Phoenix, the aged companion of

<sup>1</sup> There are some instances of ceremonial purification (cf. *Il.* i. 313; vi. 266 ff.; etc.), but there is no indication that the feeling extended to homicide particularly. For a discussion of the subject, cf. Drerup, *Homerische Poetik*, Vol. 1: *Das Homerproblem in der Gegenwart*, p. 147; Ferrini, *op. cit.*, pp. 22 f.; Glotz, *Solidarité*, pp. 228 ff.; Lipsius, *op. cit.*, p. 9, n. 25; Gillies, "Purification in Homer," *Class. Quar.*, XIX, 71 ff.; Gardikas, *τὸ ποινικὸν καὶ ἰδία τὸ φονικὸν δίκαιον παρ' Ὁμήρω*, *Ἀθηνᾶ* (1919), pp. 209 ff.; Treston, *op. cit.*, p. 112; and Calhoun, *op. cit.*, p. 16. The Theoclymenus episode (*Od.* xv. 223 ff.) shows quite clearly that no pollution was involved. Nor is the acceptance of blood-money compatible with the pollution idea. For the age of Hesiod, cf. *infra*, p. 53.

<sup>2</sup> *Od.* xiv. 402 ff. (Murray's translation):

ξείν', οὕτω γὰρ κεν μοι εὐκλείη τ' ἀρετὴ τε  
εἴη ἐπ' ἀνθρώπους ἅμα τ' αὐτίκα καὶ μετέπειτα,  
ὅς σ' ἐπεὶ ἐς κλισίην ἀγαγον καὶ ξέλεια δῶκα,  
αὐτίς δὲ κτείναμι φίλον τ' ἀπὸ θυμὸν ἐλοίμην·  
πρόφρων κεν δὴ ἔπειτα Δία Κρονίωνα λιτοίμην.

<sup>3</sup> *Od.* xvi. 402.

<sup>4</sup> *Ibid.*, iii. 310; iv. 535.

<sup>5</sup> *Ibid.*, xiii. 259 ff.

Achilles, tells of his feud with his father and of his design to slay him. But, owing to his fear of "the people's voice and the many reproaches of men," who would call him parricide, he refrained.<sup>1</sup> In later Greek story Orestes slew his mother Clytemnestra. In Homer it is not explicitly stated that he was responsible for her death, but it is assumed, for she died with Aegisthus and no other cause for her death is given. But the honor Orestes won for avenging his father's murder does not imply public approval of matricide under any circumstances.<sup>2</sup> And we may be sure that the wife who compassed the death of her husband would be freely condemned. Menelaus has nothing to say of Clytemnestra's share in the plot against Agamemnon; Aegisthus alone is responsible for his death.<sup>3</sup> Nestor, too, seems to lay the blame of her treachery to her husband upon Aegisthus and the *μοῖρα θεῶν*, though he does call her *στυγερή*.<sup>4</sup> Agamemnon's spirit speaks bitterly of her and says she has brought disgrace not only upon herself but upon her whole sex.<sup>5</sup> He does not say explicitly that she murdered him but implies that she had at least planned the murder. As a rule men shrank from slaying a guest. Heracles' murder of Iphitus is aggravated by the fact that Iphitus was his guest.<sup>6</sup> And the refusal of Eumaeus to accept Odysseus' wager, which has already been quoted, affords further evidence of this prevailing sentiment.<sup>7</sup>

The idea that murder is a menace to society is modern; in Homer it is regarded as the concern of the relatives alone and such partisans as they can assemble. Public sentiment not only tolerated blood-feuds but even demanded that men should avenge the death of their kinsmen.<sup>8</sup> Shame and dis-

<sup>1</sup> *Il.* ix. 459 ff.; cf. Buchholz, *op. cit.*, II, 83.

<sup>2</sup> *Od.* i. 298.

<sup>4</sup> *Ibid.*, iii. 269 ff., 310.

<sup>3</sup> *Ibid.*, iv. 518 ff.

<sup>5</sup> *Ibid.*, xi. 429 ff.

<sup>6</sup> *Ibid.*, xxi. 27 ff.:

ὅς μιν ξείνον ὄντα κατέκτανεν ᾧ ἐνὶ οἴκῳ,  
σχέτλιος, οὐδὲ θεῶν ὅπιν αἰδέσασθ' οὐδὲ τράπεζαν,  
τὴν ἣν οἱ παρέθηκεν.

<sup>7</sup> *Ibid.*, xiv. 402 ff.

<sup>8</sup> On the blood-feud, cf. Glotz, *Solidarité*, pp. 47 ff. and 94 ff.

When men of rank were concerned in a homicide, the resulting feud might involve so many as to amount to civil war. Tlepolemus, to avoid a disastrous feud, gathered his faction together and founded a settlement in Rhodes.<sup>1</sup> Civil war would have been the result of the feud between Odysseus and the relatives of the suitors had they not become reconciled. When once the fugitive got away, he did not seem as a rule to be in any danger. Twice the fleeing slayer is called a suppliant. But what he asks for is not protection but shelter, or assistance in continuing his flight. Theoclymenus professed to fear pursuit, but apparently his fears were groundless.<sup>2</sup> But the passage indicates that fugitive homicides were sometimes pursued by relatives of their victims. The lot of the murderer banished for life must often have been hard. The spirit of Patroclus speaks bitterly of his banishment, though he found in Peleus a noble patron and in Achilles a loving comrade.<sup>3</sup> Aegisthus is the only murderer who suffered death. He had committed a dastardly murder, and Nestor suggests that if Menelaus had slain him he would have denied him funeral rites. Menelaus himself gives no hint of such an intention, had he forestalled Orestes in slaying Agamemnon's murderer.<sup>4</sup> Three homicides paid no penalty. Heracles slew a stranger whose death could have been avenged only by war.<sup>5</sup> Meleager's distinguished services in saving his city from sack probably enabled him to defy the machinations of his incensed mother;<sup>6</sup> the punishment of Orestes by avenging furies is unknown to Homer.<sup>7</sup>

<sup>1</sup> *Il.* ii. 655.

<sup>2</sup> *Il.* xxiii. 85 ff.

<sup>3</sup> *Od.* xv. 271.

<sup>4</sup> *Od.* iii. 256 ff.; iv. 547.

<sup>5</sup> *Ibid.*, xxi. 28; cf. *Il.* xvi. 58-59,

τὴν δ' ἄψ' ἐκ χειρῶν ἔλετο κρείων Ἀγαμέμνων  
'Ατρεΐδης ὡς εἴ τι ν' ἀτίμητον μετανάστην,

for the position of a stranger.

<sup>6</sup> *Il.* ix. 565 ff.

<sup>7</sup> Murderers are spoken of in one passage as men seized by a grievous curse:

ὥς δ' ὅτ' ἂν ἄνδρ' ἀτῆ πυκινὴ λάβῃ, θεὶ τ' ἐπὶ πάτρῃ  
φῶτα κατακτείνας ἄλλων ἐξέκετο δῆμον.

(*Il.* xxiv. 480-81). The ἀτῆ is best taken as that which caused the homicide. The notion of ἀτῆ following a homicide seems to belong to a later period. But Homer does mention curses called down upon wrongdoers (*Il.* ix. 453 ff., 565 ff.; *Od.* ii. 135).

The acceptance of blood-money seems to have been comparatively rare. Apart from the trial scene pictured on the shield of Achilles, which arose out of an agreement to settle a homicide for a blood-price, there is no specific case. A man who has settled with the slayer of a brother or a son for a large sum is cited in a simile of the *Iliad*<sup>1</sup> as an instance of commendable, though perhaps unusual, self-restraint. We do not know what considerations induced relatives to accept blood-money. There is no trace of a tendency to put pressure on relatives to induce them to forego the blood-feud. Neither is there any indication that the circumstances under which the homicide was committed were ever taken into account. The modern classification of homicide as justifiable and excusable was unknown. The distinction between involuntary homicide (φόνος ἀκούσιος) and voluntary homicide (φόνος ἐκούσιος) belongs to a later period.<sup>2</sup> Patroclus committed the homicide for which he was banished, οὐκ ἐθέλων. This case shows further that not even extreme youth saved one from the penalties of manslaughter.<sup>3</sup>

There is no reliable clue to the origin of the practice of taking blood-money.<sup>4</sup> It has been suggested that it was to defray the expenses of sacrifices to appease the spirit of the dead. There is a hint of this in Achilles' promise to share with the spirit of Patroclus the ransom he received for Hector's body.<sup>5</sup> Neither is there any trace of the modern idea of compensation measured by the damages suffered by surviving relatives.<sup>6</sup>

<sup>1</sup> ix. 632 ff.

<sup>2</sup> Cf. *infra*, p. 53.

<sup>3</sup> εὐτὲ με τυτθὸν ὄντα Μενότιος ἐξ Ὀπύεντος  
ἤγαγεν ὑμέτερόνδ' ἀνδροκτασίης ὑπο λυγρῆς,  
ἤματι τῷ ὅτε παῖδα κατέκτανον Ἀμφιδάμαντος  
νήπιος, οὐκ ἐθέλων, ἀμφ' ἀστραγάλοισι χολωθεῖς.

—*Il.* xxiii. 85 ff.

In a modern court such a homicide might be adjudged excusable if, indeed, the perpetrator was of an age at which he could be tried at all. Under seven years there is no liability; between seven and fourteen there is a rebuttable presumption of incapacity for entertaining a criminal intent.

<sup>4</sup> Cf. Drerup, *op. cit.*, p. 146.

<sup>5</sup> *Il.* xxiv. 595; cf. Bréhier, *De graecorum judiciorum origine*, pp. 38 f.

<sup>6</sup> Lord Campbell's act of 1846 enabled the wife, husband, parent, and child to collect the actual damages suffered by the death of one who was killed by somebody's

It is clear that the idea of self-help on the part of an individual easily develops into community self-help in cases in which the state is injured directly or indirectly through one of its citizens. The popular sentiment against wrongdoers, which is revealed in community action and which lies at the base of the conception of criminal law, was active in the time of Homer. There are numerous cases in which wrongdoers committed acts which affected the whole community alike. A common example of this class of offender is the man who, by committing depredations upon a neighboring people, involved his fellow-citizens in responsibility. Neither the king nor the council ever undertook to punish the offender. Normally, such offenses were punished, if at all, by the people. Even in a Homeric community, public opinion was quickly crystallized<sup>1</sup> and easily translated into action through the medium of the popular assembly. In any free community, public opinion is always a latent power. Odysseus, in his character of Cretan refugee, bears testimony to the power of public opinion—*χαλεπή δ' ἔχε δήμου φήμῃς*—that forced him to go to war in Troy.<sup>2</sup> Some scholars have hastily dismissed community action in such cases as a resort to lynch law.<sup>3</sup> But, however much apparent justification may be found for this view in the differences between the orderliness and precision of modern legal machinery and the rough-and-ready methods of a primitive people, it is based upon a misconception.

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"wrongful act, neglect, or default." Similar statutes in this country have added a *solatium* to the actual damages. But the principle has nowhere been extended so as to include homicides of every kind.

<sup>1</sup> There was practically no restriction upon freedom of speech. Cf., however, the Thersites episode. Jebb, "Ancient Organs of Public Opinion," *Essays and Addresses*, pp. 139 ff., points out how the poet keeps us informed of the trend of public opinion by constantly quoting remarks or conversations that sum up the sentiments of a crowd.

<sup>2</sup> *Od.* xiv. 239.

<sup>3</sup> Cf. Lipsius, *op. cit.*, p. 6; Gilbert, *op. cit.*, p. 447. Finsler, *op. cit.*, pp. 321 ff., recognizes fully the judicial power of the people but treats it only incidentally: "Eine richterliche Gewalt hat, wie ebenfalls schon erwähnt worden, der Demos, wenn er den Eupheithes an Leib und Gut straffen will, oder die Freier Halithernes mit Busse und Mentor mit Vernichtung bedrohen." Cf. Calhoun, *op. cit.*, p. 23. Cf. Glotz, *La Cité*, p. 66, for lynch law.

The terms "mob violence" and "lynch law" are properly applied only to the acts of people who usurp the functions of the regular courts. Sporadic instances of this type of mob violence occasionally occur in certain parts of the United States. Another type of popular justice was exemplified in the settlement of the west, where isolated communities sprang up mushroom-like far in advance of the line of settlement. It required time for the establishment of the forces of law and order in these distant and often temporary settlements. Meanwhile committees known as "vigilantes" were organized to protect life and property. Such expedients were mere stop-gaps to tide the community over the time that must elapse before the government could establish its courts. They were usually justifiable under the circumstances, but they were always illegal. They were never steps in the path of political progress. In the absence of any provision for the punishment of public offenders,<sup>1</sup> the early Greeks were obliged to take measures for their own protection. If they met together and acted after due deliberation, they constituted a popular court quite as much as the Athenian assembly that tried Miltiades.<sup>2</sup> The essential difference between the Assembly of the Ten Thousand which tried Xenophon for aggravated assault and the mob of soldiers that attacked the market clerks is that in the former case they acquainted themselves with the facts while in the latter many of the participants were entirely ignorant of the cause of the attack.<sup>3</sup>

The practice of determining an issue by shouting rather than by ballot or show of hands is not an evidence of mob violence. The Spartans in the fourth century continued to express their opinion by shouts for or against a proposal in the Apella. Only in case of doubt did they resort to a formal division.

When an outrage was committed by a member of another

<sup>1</sup> The king, in his capacity of general, might punish breaches of discipline; cf. *Il.* xii. 248.

<sup>2</sup> Herodotus vi. 136. This is the first trial before the assembly of which we have any account. Cf. Lipsius, *op. cit.*, p. 180.

<sup>3</sup> Xen. *Anabasis* v. 7. 19 ff.; v. 8. 1 ff.



community, the injured person might himself seek to recover his property by presenting a claim to the community to which the stranger belonged. But that such a course involved considerable risk is clear from the fate of Iphitus, who was slain by Heracles while seeking to recover some stolen horses.<sup>1</sup> As a rule, the whole community took up these claims and took steps to obtain compensation. Thus Odysseus, when a mere lad, was sent by his father and the Council of Elders to Messenia to obtain redress for the theft of a number of sheep by Messenians.<sup>2</sup> The attitude of a community toward a marauder who thus exposed them to claims for damages is well illustrated by the measures taken by the Ithacans to punish Eupheithes, who, by joining in a Taphian raid against the Thesprotians, a friendly people, had rendered the Ithacans liable to claims for redress. It was only the intervention of Odysseus that saved him from death and confiscation of property.<sup>3</sup> Failing redress by peaceful means, the injured people usually resorted to reprisals. The accruing booty was divided by the elders acting as a court of claims and was distributed among those who had suffered loss of property.<sup>4</sup>

The line of demarcation between a deliberative assembly and a judicial assembly is ill defined.<sup>5</sup> A fair example of a meeting of the people which contemplated the possibility of judicial action is that summoned by Telemachus to deal with the suitors.<sup>6</sup> Telemachus brings up what is apparently a private grievance; but as Halitherses hinted, it really concerned the whole people.<sup>7</sup> And the event proved that this was the case, for Odysseus later demanded that they make

<sup>1</sup> *Od.* xxi. 22 ff.

<sup>2</sup> *Ibid.*, xxi. 16 ff.

<sup>3</sup> *Ibid.*, xvi. 420 ff. This incident will receive fuller treatment in the discussion of the judicial power of the people.

<sup>4</sup> *Il.* xi. 685 ff. Cf. Lécivain, "Le droit de se faire justice soi-même et les représailles," *Memoires de L'Academie des Sciences de Toulouse* (1897), p. 277. Lécivain and the writers whom he quotes dismiss the Homeric period with a mere reference to the mission of Odysseus and the raid of Nestor.

<sup>5</sup> Cf. *Od.* ii. 28, and Euripides *Orestes*, 870 ff., where the trial of Orestes is represented as being held before the Argive assembly.

<sup>6</sup> Cf. Glotz, *Solidarité*, p. 16.

<sup>7</sup> *Od.* ii. 45; 166 ff.

good the material losses occasioned by the constant feasting of the suitors.<sup>1</sup> Three speakers presented the case against the suitors, and four addressed the assembly in their favor. Telemachus did not ask for the punishment of the suitors or for the restitution of his property.<sup>2</sup> At best he hoped to be able to induce or force them to leave the palace. ἀλλὰ πολὺ πρὶν φραζώμεσθ' ὥς κεν καταπαύσομεν· οἱ δὲ καὶ αὐτοὶ πανέσθων, says Halitherses, one of Telemachus' active supporters.<sup>3</sup> But the threats of the suitors deterred the people from taking any active measures.

As a result of the slaughter of the suitors Odysseus was himself charged with offenses against the community. After disposing of the bodies of the slain suitors, the people resorted to the ἀγορά. Eupheithes, the father of Antinous, was the first speaker. He began, not by asking aid in avenging the deaths of the suitors, but by asking for the punishment of Odysseus as a public offender: ὦ φίλοι, ἦ μέγα ἔργον ἀνὴρ ὅδε μήσατ' Ἀχαιοῦς.<sup>4</sup> Speeches against the proposal of Eupheithes were made by partisans of Odysseus. Halitherses pointed out that the men richly deserved their fate, and Medon, the herald, a forced adherent of the suitors, expressed his conviction that the gods were on the side of Odysseus.<sup>5</sup> Finally a majority decided to slay Odysseus. By a curious reversal of fortune Eupheithes now led the people against the man who years before had saved him in a similar predicament.<sup>6</sup> Our information about this case is meager. The people met in the absence of the king and reached a decision with which he was not in accord. But there is no hint that they exceeded their powers. The implication is, rather, that they yielded to the persuasions, and not the power, of Odysseus in allowing the guilty man to go free. Judging from the orderly

<sup>1</sup> *Od.* xxiii. 356.

<sup>2</sup> He does, indeed, suggest restitution, but in a very guarded manner. Cf. *Od.* ii. 74.

<sup>3</sup> *Od.* ii. 167.

<sup>4</sup> *Ibid.*, xxiv. 426.

<sup>5</sup> *Ibid.*, xxiv. 439 ff.

<sup>6</sup> *Ibid.*, xvi. 420 ff. Cf. *supra*, p. 24. As has been pointed out, it was the practice to hold the whole community responsible for cattle-lifting, even when only a few participated.

procedure against Odysseus, we may assume with some degree of confidence that Eupheithes was treated in much the same way. Paris, like Eupheithes, had, by carrying off Helen, exposed his people to reprisals on the part of the Greeks. Hector<sup>1</sup> has this situation in mind when he says:

ἀλλὰ μάλα Τρῶες δευδήμενες ἥ τέ κεν ἦδη  
λαῖνον ἔσσο χιτῶνα κακῶν ἔνεχ' ὅσσα ἔοργας.

Stoning was a common mode of executing the death penalty in antiquity generally.<sup>2</sup> The suitors, in threatening to fine Halitherses for aiding and abetting Telemachus, contemplated the use of the judicial powers of the people for their own ends. No doubt they possessed sufficient ascendancy over the people to secure their acquiescence in the punishment of Halitherses, though the charge against him could not have appealed to any considerable number of them.<sup>3</sup>

The Homeric ἀγορά as the medium of community self-help was the prototype of the Athenian ἡλιαία. The φῆμις δῆμον eventually became the κύρος δῆμον.<sup>4</sup>

In Homeric times a common method of bringing a dispute to an issue was by means of a wager.<sup>5</sup> The wager takes various forms. There are traces of challenge to battle as a means of settling disputes. This is in effect a wager. After the chariot race Achilles proposed to give Eumelus the second prize of a mare because, owing to an accident, he had lost his leading position and had been compelled to drop out.

<sup>1</sup> *Il.* iii. 56 f.

<sup>2</sup> Cf. Hirzel, "Die Strafe der Steinigung," *Abhandl. d. Königl. Sächs. Gesellschaft*, Phil. Hist. Kl., XXVII, 225 ff.

3 αἱ κε νεώτερον ἄνδρα παλαιά τε πολλὰ τε εἰδὼς  
παρφάμενος ἐπέεσσιν ἐποτρύνῃ χαλεπαίνειν  
αὐτῷ μὲν οἱ πρῶτον ἀνιηρέστερον ἔσται

σοὶ δέ, γέρον, θωπὴν ἐπιθήσομεν

(*Od.* ii. 188 ff.). Finsler, *op. cit.*, p. 322, thinks that in the case of Mentor also judicial proceedings were contemplated (*Od.* xxii. 216 ff.). In such examples of community action as the foregoing, Calhoun, *op. cit.*, pp. 20 ff., sees the beginnings of criminal law.

<sup>4</sup> Cf. Aristotle *Ath. Pol.* xxxv. 2.

<sup>5</sup> Cf. Bréhier, *De graecorum iudiciorum origine*, pp. 91 ff.

But Antilochus protested and claimed the mare because he was second in the race:

τὴν δ' ἐγὼ οὐ δώσω· περὶ δ' αὐτῆς πειρηθήτω  
ἀνδρῶν ὅς κ' ἐθέλῃσιν ἐμοὶ χεῖρεσσι μάχεσθαι.<sup>1</sup>

In view of this challenge to combat, Achilles yielded and gave Antilochus the mare. The award was at once protested by Menelaus on the ground that Antilochus had won by a foul, and the dispute was finally settled by a challenge to Antilochus to take an evidentiary oath, which is also a species of wager. At first Menelaus called upon the chiefs to arbitrate impartially (μηδ' ἐπ' ἀρωγῇ) between himself and Antilochus, but immediately he rejected his own suggestion in favor of a challenge to take an evidentiary oath.<sup>2</sup> Trial by evidentiary oath consists in tendering to an opponent an oath embodying his contentions, or in offering to take an oath embodying one's own contentions.<sup>3</sup> Antilochus refused to take the oath, and without more ado the prize went to Menelaus. The oath which Menelaus purposed to have Antilochus take was to the effect that he did not win by a foul. Had Antilochus ventured to take the oath at the risk of being δαίμοσι

<sup>1</sup> Il. xxiii. 553 f.; Cf. Bréhier, *De graecorum iudiciorum origine*, p. 96.

<sup>2</sup> Il. xxiii. 574 ff.

<sup>3</sup> Bonner, *Evidence in Athenian Courts*, p. 74. This form of trial is found in the primitive stages of many legal systems. It was known in Germanic law (Grimm, *Deutsche Rechtsaltertümer*, II, 495 ff.); in Anglo-Saxon law it was occasionally allowed (Thayer, *A Preliminary Treatise on Evidence at the Common Law*, pp. 24 f.); and in Massachusetts colony a white man was permitted by law to swear an evidentiary oath in answer to the accusation of an Indian (1 Prov. Laws Mass. 151 [1693-94]). After the heroic period various references to the evidentiary oath are found. Theognis makes several references to the false evidentiary oath (199 ff., 1139 ff.); Aeschylus gives an instance of a challenge to an evidentiary oath which was refused (*Eumenides*, 429 ff.); and Herodotus in two instances refers to this type of oath (vi. 68 f. and vi. 86). Various references are made to it in the Gortyn code (ii. 11 ff.; iii. 1 ff.; ix. 51 ff.). Cf. Headlam, "The Procedure of the Gortynian Inscription," *Jour. of Hellenic Studies*, XIII, p. 65, and Bücheler and Zitelmann, *Das Recht von Gortyn*, ad. loc. An interesting type of the evidentiary oath is the oath of the Athenian father to the legitimacy of a son on his introduction into the phratry (Isaeus, vii. 16). A change attributed to Solon allowed both parties to take the oath in cases in which no other evidence was available. (Cf. *infra*, pp. 173 ff.) From this doubtless arose the oath of the parties preliminary to a trial. On the whole question of the evidentiary oath, cf. Gertrude Smith, *The Administration of Justice from Hesiod to Solon*, pp. 55 ff.

ἀλιτρός, he would have been entitled to the prize according to the terms of the challenge. This is implied in Menelaus' assertion during the race, οὐδ' ὥς ἄτερ ὄρκου οἴση ἄθλον. No money wager is required in this kind of trial, but Antilochus expresses his willingness to pay the usual damages. This offer is, of course, quite gratuitous, but it serves to show how firmly fixed was the custom of demanding damages along with the restitution of an article wrongfully taken. Menelaus' words, εἰ δ' ἄγ' ἐγὼν αὐτὸς δικάσω, are commonly taken to mean that he proposes to act as judge—and that, too, in his own case. Now Menelaus had rejected his own proposition to submit the dispute to the arbitration of the chiefs lest people should criticize him and say, "Menelaus, by constraining Antilochus with false words, has gone off with the prize." Trial by evidentiary oath was preferred expressly because the result would be just (ἰθεῖα) and because there would be no chance for a decision ἐπ' ἄρωγῇ. Under these circumstances Menelaus' words cannot be interpreted to mean that he intended to be judge in his own case. He would, doubtless, have been ready to agree with Plato<sup>1</sup> that the gods, and not men, are the judges in this kind of trial. The confusion arises from pressing the meaning of δικάσω too closely, owing to a desire to preserve a distinction between the active and middle voices. Menelaus simply means to say, "I'll make my right in the matter clear." As a matter of fact, the chiefs who are asked to criticize his proposal are the only persons who can be regarded as judges. This is the only specific instance in Homer of the tendering of an evidentiary oath. Autolycus, the maternal grandfather of Odysseus, who is said to have excelled all men in stealing and swearing, was apparently able to escape responsibility, when charged with theft, by taking an oath. He was able to shape an oath so craftily that he could seem to say one thing and yet mean another.<sup>2</sup> Hermes, in the Homeric hymn, offered to swear that he had not stolen the cattle.<sup>3</sup>

<sup>1</sup> *Laws*, 948 B.

<sup>2</sup> *Od.* xix. 396; cf. *Il.* x. 267; *Ovid Met.* xi. 313.

<sup>3</sup> *Hymn to Hermes*, 304.

The above-mentioned ways of dealing with wrongdoers—self-help, community action, the evidentiary oath—are more or less informal. It is obvious that as soon as a community possesses any form of organization it will provide some means for the formal settlement of disputes between citizens.<sup>1</sup> Where the dispute was not the result of violence, the parties showed a disposition to resort to amicable means of settlement. Unquestionably, voluntary arbitration was the first step in a systematic administration of justice. This, too, must at first have been an informal procedure. For instance, in the dispute over the second prize in the chariot race described above, Menelaus at first called upon the chiefs to arbitrate impartially between himself and Antilochus.<sup>2</sup> But a more formal stage had already been reached in the time of the Homeric Greeks. They had a system of challenge and wager for the purpose of inducing a reluctant opponent to submit to arbitration. It was only a question of time until arbitration became obligatory in case either party desired it. Naturally the disputants would seek to obtain the services of a person who had a reputation for impartiality and wisdom, without regard to rank or official position. Even a woman, Arete, queen of the Phaeacians, acted as an arbitrator.<sup>3</sup> But the prestige of the king must have marked him as the natural arbitrator. And it is the arbitral functions of the Homeric kings that Aristotle<sup>4</sup> has in mind when he says that they tried cases (*τὰς δίκας ἔκρινον*). Homer, it is true, nowhere pictures a king dispensing justice. But this is a mere accident, for Idomeneus proposed to Ajax to submit their dispute to Agamemnon.<sup>5</sup> Minos, settling disputes in the spirit land, certainly had his prototype in such kings as Nestor, who *περὶ οἷδε δίκας*, and Sarpedon, who *Λυκίην εἵρυστο*

<sup>1</sup> Modern investigators are not agreed as to the kind of provision that was made. Thonissen, *Le droit pénal de la république athénienne*, p. 23, conveniently summarizes the different views: (1) Parties chose arbitrators who had no power to enforce their awards; (2) judges were chosen from among the *γέροντες*, and they had the power to enforce their decisions; (3) the judges were really magistrates and represented the king. Finsler, *op. cit.*, pp. 320 f., 329, denies that a king ever acted as judge.

<sup>2</sup> Cf. *supra*, pp. 26 ff.

<sup>4</sup> *Politics*, 1285b.

<sup>3</sup> *Od.* vii. 74.

<sup>5</sup> *Il.* xxiii. 485.

δικησὶ τε καὶ σθένει  $\Phi$ .<sup>1</sup> Everywhere in ancient times kings and tyrants exercised judicial functions.<sup>2</sup> Deioces of Persia and Peisistratus<sup>3</sup> of Athens administered justice as arbitrators. Accordingly we are justified in assuming that the Homeric ruler, whether a Zeus-nourished king or the official head of an aristocratic government, was constantly called upon to act as arbitrator. From a royal arbitrator to a court of γέροντες is not a far cry. In the *Iliad* the chiefs are called δικασπόλοι. The term occurs only once in the *Odyssey*, where Telemachus is called δικασπόλος by his grandmother.<sup>4</sup> Clearly it was an established practice to refer disputes to the lesser chiefs acting either individually or in a body.<sup>5</sup> An ambitious aristocracy would not fail to recognize the advantages that would accrue to it from the establishment of a regular court of arbitration to which disputants might refer their differences. In the Greek camp before Troy there was a place in or adjoining the ἀγορά which was set apart for the administration of justice<sup>6</sup> and which was provided with seats for the judges.

The appearance of a trial-scene on the shield of Achilles as a typical incident of public life, and two similes drawn from judicial activities point to some sort of judicial organization.<sup>7</sup> Court sessions were probably held with some degree

<sup>1</sup> *Od.* iii. 244; *Il.* xvi. 542.

<sup>2</sup> Among the Lydians, Persians, Egyptians, and Hebrews. Herod. i. 14, 96-97, 100; ii. 129; II Sam. 15:2.

<sup>3</sup> Arist. *Ath. Pol.* xvi. 5; cf. Stesagoras of the Chersonese, Herod. vi. 38.

<sup>4</sup> *Il.* i. 237 ff.; *Od.* xi. 184 ff.

<sup>5</sup> *Od.* xii. 439-40. Some think that the trial scene (*Il.* xviii. 497 ff.) has reference to a sitting of the whole council. Cf. Glotz, *La Cité*, pp. 57 f., and Ferrini, *op. cit.*, p. 40.

<sup>6</sup> *Il.* xi. 807; xviii. 497, 504.

<sup>7</sup> Treston, *op. cit.*, p. 40, supposes that the elders in the trial-scene constituted a Pelasgian court. The Achaean kings never really functioned as δικασπόλοι, but the elders were the real judges. In fact, the kings knew little and cared less about these Pelasgian courts. The elders were the tribal chiefs, whose main function was to arbitrate in cases of interclan or interphratry disputes. Inside of each clan there would be similar assemblies for jurisdiction in intraclan disputes (pp. 82 ff.). Treston's insistence on the distinction between Pelasgians and Achaeans has led him into many errors. Cf. Calhoun, *op. cit.*, p. 18, n. 10.

of regularity, and might last all day.<sup>1</sup> There is no indication that recourse to such a court was obligatory. Doubtless the tendency of public opinion was to support the man who was willing to arbitrate his differences with a fellow-citizen. The interests of the aristocracy would be materially advanced by fostering such a tendency.<sup>2</sup>

There are several examples of challenge and wager as an inducement to arbitration. When Idomeneus and Ajax had a dispute regarding the identity of the leader in the chariot race, the Cretan warrior said, "Come then, let us wager a tripod or a caldron and make Agamemnon, Atreus' son, our umpire, which mares are leading."<sup>3</sup> And when Eumaeus, the swineherd, refused to believe the disguised Odysseus when he asserted that his master would return, Odysseus offered to stake his life against a suit of clothes that he spoke the truth. The parties to a challenge entered into a solemn agreement, confirmed by oath, to abide by the decision.<sup>4</sup> The famous trial-scene on the shield of Achilles is another instance of arbitration on challenge and wager.<sup>5</sup> Like all the scenes represented on the shield, this really combines a series of pictures;<sup>6</sup> that is to say, several pictures would be required to illustrate the poet's description. The text of the passage is as follows:

<sup>1</sup> *Il.* xvi. 387 f.; *Od.* xii. 439.

<sup>2</sup> By the time of Hesiod the processes of arbitration had become practically compulsory. *Works and Days*, 35 ff. Cf. *infra*, pp. 43 ff.

<sup>3</sup> *Il.* xxiii. 485. Lang, Leaf, and Myer's translation.

<sup>4</sup> *Od.* xiv. 391 ff.; cf. *ibid.* xvi. 102 f.

<sup>5</sup> Among the important discussions of the trial-scene are the following: Ferrini, *op. cit.*, pp. 42 ff.; Hofmeister, *Zeitschrift für vergleichende Rechtswissenschaft*, II, 443 ff.; Bréhier, "La royauté homérique," *Rev. historique*, LXXXIV, 27 ff.; Glotz, *Solidarité*, pp. 115 ff.; *La Cité*, p. 57; Bonner, "Administration of Justice in the Age of Homer," *Class. Philol.*, VI, 24 ff.; Lipsius, *Leipziger Studien zur classischen Philologie*, XII, pp. 225 ff.; Leaf, *Translation of the Iliad* (1883), p. 516; *Companion to the Iliad* (1892), p. 312; edition of the *Iliad*, *ad. loc.*; Maine, *Ancient Law*, pp. 385 f.; Myres, *op. cit.*, pp. 198 ff.; Busolt-Swoboda, *Griechische Staatskunde*, I, 332 ff.; Treston, *op. cit.*, pp. 34 ff.; Calhoun, *Criminal Law*, pp. 18 f.; *Proceedings of the Classical Association*, XVIII, p. 93; Ehrenberg, *op. cit.*, p. 55; Croiset, "La scène judiciaire représentée sur le bouclier d'Achille," *Rev. d. études grecques* XXXII, 96 ff.; Steinwenter, *op. cit.*, p. 34, n. 3.

<sup>6</sup> Dareste, *Annuaire des études grecques*, XVIII, 91.



- 497 λαοὶ δ' εἰν ἀγορῇ ἔσαν ἄθροοι· ἐνθα δὲ νεῖκος  
 ὠρώρει, δύο δ' ἄνδρες ἐνεΐκεον εἵνεκα ποινήs  
 ἀνδρὸς ἀποφθιμένον· ὁ μὲν εὐχετο πάντ' ἀποδοῦναι  
 500 δῆμῳ πιφαύσκων, ὁ δ' ἀναίνετο μηδὲν ἐλέσθαι·  
 ἄμφω δ' ἰέσθην ἐπὶ ἱστορίῳ πείραρ ἐλέσθαι.  
 λαοὶ δ' ἀμφοτέροισιν ἐπήπυσον, ἀμφὶς ἄρωγοί·  
 κήρυκες δ' ἄρα λαὸν ἐρήτυον· οἱ δὲ γέροντες  
 ἦατ' ἐπὶ ξεστοῖσι λίθοις ἱερῷ ἐνὶ κύκλῳ,  
 505 σκῆπτρα δὲ κηρύκων ἐν χέρσ' ἔχον ἡεροφώνων·  
 τοῖσιν ἔπειτ' ἤισσον, ἀμοιβῆδ' δὲ δίκασον.  
 κεῖτο δ' ἄρ' ἐν μέσσοισι δύο χρυσοῖο τάλαντα,  
 508 τῷ δόμεν, ος μετὰ τοῖσι δίκην, ἰθύντατα εἴποι.<sup>1</sup>

In disputed matters the following translation embodies the interpretations which are advocated in the subsequent discussion.

"But the folk were gathered together in the place of assembly. And there strife had arisen and two men were contending about the blood-price of a slain man. The one avowed that he had paid all and the other denied that he had received anything, declaring it to the people. And both were eager to gain a decision by arbitration. The folk applauded both, aiding either side. Heralds restrained the folk. And the elders sat on polished stones in a sacred circle, and they held in their hands the staves of clear-voiced heralds. Before them<sup>2</sup> then they [the elders] jumped up and gave their decisions in turn [*or* the litigants jumped up and made their pleas in turn]. And two talents of gold lay in their midst to be given to the one who should most justly plead his cause before them."

The passage fairly bristles with difficulties, and the various problems involved have been the subjects for interminable debate. There are certain large problems of vital importance which must be settled first; that is, the most plausible explanation must be determined. The most important point, and the one on which there is the greatest lack of unanimity, is the question of the point at issue. According to one view, lines 499-500 should not be translated as above<sup>3</sup> but mean, rather, "the one claimed that he was paying it all (i.e., promised to pay it), but the other refused to accept anything." Then the question at issue is, "*must* the avenger accept the blood-money or *might* he claim blood for blood?"<sup>4</sup>

<sup>1</sup> *Il.* xviii. 497 ff.

<sup>2</sup> Or τοῖσιν may mean "with the scepters."

<sup>3</sup> The scholiast agrees with the foregoing translation.

<sup>4</sup> Leaf, *Journal of Hellenic Studies*, VIII (1887), 122 ff.; Croiset, *op. cit.*

This theory implies that in some way the homicide itself is in issue and also involves the question of a compulsory wergeld system. It may be admitted that linguistically this interpretation is possible, but Lipsius argues strongly against it.<sup>1</sup> A minor difficulty lies in the word *πάντα*, line 499. A man who insisted on his right to pay a blood-price could scarcely be said to promise to pay *all*. But there is a more serious difficulty. There is nothing in Homer to show that relatives could be forced to accept blood-money; neither is there any evidence of a growing popular sentiment in favor of a settlement.<sup>2</sup> Quite the contrary is the case. Banishment, as we have seen, is the usual fate of the slayer. Moreover, the acceptance of blood-money is cited as an example of self-restraint.<sup>3</sup> But it by no means follows that the passion of the man was restrained if he accepted blood-money under compulsion; his heart might still be seething with anger and a desire for revenge. Surely the poet is thinking of a man who acted of his own free will. Leist<sup>4</sup> assumes that when the homicide was *ἀκούσιος* the relatives were obliged to accept money. Unfortunately for this theory, in the only instance of *φόνος ἀκούσιος*, the slayer, Patroclus, a mere youth, was banished.<sup>5</sup> As far as the evidence of the poems goes, the distinction between *φόνος ἀκούσιος* and *φόνος ἐκούσιος* played

<sup>1</sup> Dareste, *Nouvelles études d'histoire du droit*, p. 6, is unconvinced by the criticisms of the view of Leaf by Lipsius in *Leipziger Studien* (1890), pp. 228 ff.

<sup>2</sup> In view of the killing of Aegisthus, Leaf's statement is surprising. "There is, I believe, no case in the poems where blood is ever exacted for blood," *op. cit.*, p. 124.

<sup>3</sup> *Il.* ix. 632-37:

καὶ μὲν τίς τε κασιγνήτου φονῆος  
ποιήνῃ ἢ οὐ παιδὸς ἐδέξατο τεθνηῶτος  
καὶ ῥ' ὁ μὲν ἐν δῆμῳ μένει αὐτοῦ πόλλ' ἀποτείσας,  
τοῦ δέ τ' ἐρητύεται κραδίη καὶ θυμὸς ἀγήνωρ  
ποιήνῃ δεξαμένη. σοὶ δ' ἄλληκτόν τε κακὸν τε  
θυμὸν ἐνὶ στήθεσσι θεοὶ θέσαν εἰνεκα κούρης  
οἴης.

Leaf (*op. cit.*, p. 124) cites this passage to prove that the payment of a fine instead of exile was the recognized course.

<sup>4</sup> *Gräco-italische Rechtsgeschichte*, pp. 330 ff.

<sup>5</sup> This case has already been discussed in some detail, *supra*, p. 21.

no part in determining the fate of the slayer; neither is it a necessary assumption to explain the trial scene.

It has been suggested that it is difficult to account for the deep popular interest in the trial unless the homicide is the issue. The tremendous interest in the proceedings is evidenced by line 497.<sup>1</sup> But if it is assumed that the present suit is connected with an earlier feud, the popular interest in the case easily becomes clear. This brings us to the second theory, i.e., that before the present trial a man had been killed and an agreement was reached to make a money settlement for the blood-feud which arose. The shield scene represents the dispute as to whether this money has been paid or

<sup>1</sup> Myres, *op. cit.*, pp. 200 ff., has a detailed theory about the identity of λαοί in various lines. In line 497 it refers merely to the orderly organized groups of society; in line 502 it is not the whole assembly but merely the kinsmen of the principals (this explains their partisanship); and in line 503 it is again the whole assembly. In line 500, δῆμος, he asserts, means the whole countryside, i.e., the whole crowd of onlookers. It seems impossible to see any distinction between the four. Gilbert suggests that the people were *Eideshelfer* (*Beiträge*, p. 469, n. 1). Others believe that they decided to which of the elders the two talents should go. Various attempts have been made to explain the excitement of the λαοί. Glotz, *Solidarité*, p. 118, says that it is due to the fact that if the wergeld had not been paid as contracted, hostilities would begin all over again. This gives sufficient motive for their excitement, but there are other considerations also which must be mentioned. Maine speaks of the trial (*Ancient Law*, p. 386) as a "striking and characteristic, but still only occasional feature of city life." This would explain the interest of the people to some extent. Treston, on the other hand (*op. cit.* p. 42), argues that a wergeld dispute was one of the commonest occurrences of tribal life. The interest is to be explained by the fact that "the folk" are the wider kinsmen of plaintiff and defendant. In a note on the primitive character and informality of Homeric justice, Calhoun says: "The picture is not that of a court assembled by an official to try a case. It is of the people—and the gerontes—assembled in the agora, where they go every day that their presence is not demanded elsewhere, exactly as the Athenians did in the fifth century. The gerontes occupy their customary seats of honour, and the people throng hither and thither, but when an interesting or notorious dispute comes before the gerontes, or before one or more of them, a circle is quickly formed. Then the heralds who are regularly in attendance upon the gerontes have to preserve order. Sooner or later any dispute of more than trivial character was bound to find its way into the agora and to the gerontes, for the simple reason that the disputants were bound sooner or later to come face to face with one another in the agora" (*Proceedings*, p. 93, n. 2). Vinogradoff, *op. cit.*, p. 90, makes an interesting comparison of the partisanship of the people in this scene with the interest of phratry members in hearing appeals concerning citizenship before five appointed *συνήγοροι* (*IJG*, II, xxix, pp. 200 ff.). The elders in the Homeric scene correspond to the five *συνήγοροι*.

not. The defendant claims that he has paid the entire sum; the plaintiff denies that he has ever received payment.<sup>1</sup> In view of other matters in the passage now to be discussed, this seems to be the correct interpretation.

The *ιστωρ* (l. 501) has been variously identified as a witness, as the king, as the chairman of the *γέροντες*.<sup>2</sup> The scholiast regards the *ιστωρ* as a witness; and Leaf followed him in his first theory (1883) and translated "and each one was fain to obtain consummation on the word of his witness." Recently this theory was revived by Treston,<sup>3</sup> who thinks that the relation of the verse to its context is distinctly in favor of the interpretation "witness." He assumes that the witnesses were included among the people and were brought forward to testify as to the actual transference of property. They would therefore be, in effect, compurgators. An objection urged by Dareste is fatal to this theory.<sup>4</sup> If the case was to be decided by the testimony of a witness, what need was there of pleas by the parties or of discussions by the elders? In 1902 Dareste explained the *ιστωρ* as the sole judge while the elders were assessors.<sup>5</sup> This is a possible explanation although there is no mention of a presiding officer of the council of elders in connection with an arbitration.<sup>6</sup> Idome-

<sup>1</sup> This view is followed by Glotz, Lipsius, Bonner, Calhoun, Treston, Maine and Bréhier. Treston misunderstands Lipsius (*op. cit.*, p. 39, and elsewhere). He credits Lipsius with maintaining that "the trial in question was a murder-trial—a decision of homicidal guilt or innocence; he therefore holds that the two talents of gold were the actual Wergeld." It is true that Lipsius interprets the talents as Wergeld; but as to the point at issue, he says as follows: "Zwei Männer streiten auf dem Markte über das Sühngeld für einen erschlagenen Mann; der eine behauptet, es ganz erlegt, der andere, nichts empfangen zu haben."

<sup>2</sup> *ιστωρ* means the "expert," the "one who knows." It could, of course, be used of one who gives judgment or of a witness.

<sup>3</sup> *Op. cit.*, p. 43. Cf. also, Gardikas, *op. cit.*, p. 210.

<sup>4</sup> *Annuaire des études grecques*, 1884, pp. 94 ff.

<sup>5</sup> *Nouvelles études d'histoire du droit* (1902), p. 11. Cf. Meyer, *op. cit.*, II, 357.

<sup>6</sup> After the Pylians had made a successful raid on the Eleans, the king selected a portion of the plunder to recoup losses he had suffered at the hands of the Elean raiders. The elders, acting as a court of claims, divided the remainder among those who had lost property. If the king acted in this case, he is not distinguished from the nobles (*Il.* xi. 670 ff.).

neus, in the dispute between himself and Ajax, proposed Agamemnon as the arbitrator; while Menelaus, in his dispute with Antilochus, offered to submit the matter to the 'Ἀργείων ἡγήτορες ἡδὲ μέδοντες.<sup>1</sup> But Dareste's earlier view (1884) that ἐπὶ ἱστορίᾳ merely means "by arbitration" is the most satisfactory.<sup>2</sup> Leaf adopted this view in his later writings (1892 and 1902); and it has since been followed by Bonner, Busolt, Calhoun, Lipsius<sup>3</sup> and Steinwenter.<sup>4</sup>

Line 506 is not free from difficulty, although the theory that it refers to the litigants has been rather generally abandoned—i.e., "they (the litigants) hurried forward and pleaded each his cause in turn." So it was explained by Doederlein and Heyne. It is obvious that ἡσσαν suits the eager litigants better than it suits the judicial elders; but two objections may be urged: the abrupt change of subject necessitated by this interpretation, and the fact that δικάζον would have to be considered as equivalent to δικάζοντο. It is said that δικάζω in the active is never used of a litigant.<sup>5</sup> To maintain this rule, however, in one instance Menelaus must be considered both plaintiff and judge in the same case.<sup>6</sup> In the shield picture the poet is describing a variety of incidents in connection with a trial in public. And it is certainly surprising that the only line which deals with the proceedings should be devoted to the process by which a decision is reached which is of little interest in comparison with the pleas of the parties. But, so far as the legal interpretation of the passage is concerned, it is of no consequence whether the line refers to the litigants or the elders. The scholiast refers the line to the action of the judges.

<sup>1</sup> *Il.* xxiii. 485, 573.

<sup>2</sup> *Annuaire des études grecques*, XVIII, p. 95: "L'ἱστορία et les γέροντες sont seule et même chose." (So also Lipsius, *Leipziger Studien* [1890], p. 231.)

<sup>3</sup> Lipsius says that ἱστορία is identical with the group of elders. Myres advances a curious theory, i.e., that it refers to the one who gave the final decision and that this man, as shown by line 508, was someone who gave voluntary and effective help from the agora, whose decision the elders agreed to adopt as better than their own.

<sup>4</sup> *Op. cit.*, p. 36.

<sup>5</sup> Cf. Laurence, "Judges and Litigants," *Jour. of Philol.*, VIII (1879), 125 ff.

<sup>6</sup> *Il.* xxiii. 570. Cf. *supra*, p. 28.

The next point is the significance and destination of the two talents. Lipsius' view has already been noted, that they constituted a genuine wergeld deposited in court by the defendant, to be reclaimed by him if successful, otherwise to go to the plaintiff.<sup>1</sup> Lipsius admits that two talents is a small sum for the price of a slain man. In the only other case where blood-money is mentioned, the amount is said to have been large: "Yet doth a man accept recompense of his brother's murderer or for his dead son: and so the slayer for a great price abideth in his own land."<sup>2</sup> It is pointed out that the close relationship, that of brother or son, accounts for the largeness of the sum. But even if we accept the assumption that in the trial scene the slain man is a distant relative of the plaintiff, the sum is still too small. Two talents are the fourth prize in a chariot race in which the first is a tripod and a woman, the second a mare, and the third a caldron. Surely a freeman is of more value than a female slave.<sup>3</sup> Indeed, a woman or a tripod is the usual prize in a chariot race;<sup>4</sup> and a tripod or a caldron is an ordinary wager in a trivial dispute between Ajax and Idomeneus.<sup>5</sup> Was the life of a man held so lightly by even a distant relative? Surely lifelong banishment could not be commuted for so small a sum. Busolt is of the opinion that a wergeld could easily be small in view of the fact that there would be taken into consideration the property of the murderer, the personality and relationship of the deceased, and the circumstances under which the murder occurred. It is perhaps true that the

<sup>1</sup> Lipsius, *Das Attische Recht*, p. 4; Busolt-Swoboda, *op. cit.*, p. 333, follows Lipsius.

<sup>2</sup> *Il.* ix. 632 ff.

<sup>3</sup> *Il.* xxiii. 262-70. These women not only were skilled in handiwork (ἔργα ἰδυίας) but possessed personal charms (αἰ κάλλει ἐνίκων φύλα γυναικῶν [*Il.* ix. 130]).

<sup>4</sup> *Il.* xxii. 164. This phase of the question is treated by Ridgeway, *Jour. of Philol.*, X, 30 ff. In a later paper, *Jour. of Hellenic Studies*, VIII, 133, he discusses the value of the Homeric talent and shows that it is not too large a sum for a reward to the best judge. He finds that the talent is equal in value to an ὀξ. The results of these investigations tend to confirm the objection that two talents are quite insufficient for the blood-price.

<sup>5</sup> *Il.* xxiii. 485.

amount of the wergeld would, in any case, be fixed in some proportion to the property owned by the murderer; but there is no indication, as has been observed before, that any account was taken of the kind of homicide.

A second theory sees in the two talents a court fee. So Glotz argues.<sup>1</sup> Treston<sup>2</sup> makes them a kind of advocate's fee deposited by the litigants to encourage the advocates to give a proper exposition of the unwritten codes of the tribes. He is therefore compelled to provide advocates, and he assumes that two of the elders acted in this capacity. Myres<sup>3</sup> sees in the talents a customary fee to go to someone who gives a voluntary decision from the agora, this decision being adopted by the elders as better than their own. Obviously Myres is anticipating the difficulty which arises if it is assumed that the talents are to go to one of the elders, that is, the difficulty of deciding to which one they shall go. Maine compares the procedure described here with the payment of a *sacramentum* in archaic Roman law. This was a wager, offered by the plaintiff and accepted by the defendant, which went to the state. The large sum in Homer as compared with the trifling amount of the *sacramentum* he accounts for by supposing that the Homeric scene represents fluctuating usage rather than usage consolidated into law. The two talents, according to his theory, were deposited by the two litigants and were destined for the judge "who shall explain the grounds of his decision most to the satisfaction of the audience."<sup>4</sup> Beyond this point it is impossible to follow the proceedings. It would seem necessary to confine the contest for the prize to those of the judges whose opinion agreed with the verdict; otherwise the people might reach a conclusion at variance with that of the council. For we may be sure that the merits of the case would play a large part in the popular decision. Such a result would assuredly defeat the purpose of the arbitration. On the other hand, if the prize must be assigned to one of the majority judges, what is the basis of the decision? In a case involving a question of fact (that is,

<sup>1</sup> *Solidarité*, p. 128; *La Cité*, p. 57.

<sup>2</sup> *Op. cit.*, p. 89.

<sup>3</sup> *Op. cit.*, p. 207.

<sup>4</sup> *Ancient Law*, p. 386. Cf. the scholiast; Brehier, *Rev. historique*, LXXXIV, 29

was the money paid as alleged?) there could be but little difference between the affirmative opinions in point of merit. Laurence<sup>1</sup> has emphasized this feature of the theory in a vein of mild and well-deserved satire. He points out that if the theory is correct there must have been two trials: one in which the merits of the suit were adjudged, and a second one to judge the merits of the respective judgments. Furthermore, it is quite conceivable that the spectators would not have been unanimous in their awarding of the prize, and it is incongruous to suppose that they would have had the duty of rewarding the elders. Lastly, the amount of the reward is quite disproportionate to the services rendered by the elders. It is doubtless to avoid all of these incongruities that Leist, Leaf, and other followers of Maine have, without sufficient warrant, assumed that the homicide itself is in issue. This would allow some considerable variety of reasons for reaching the same conclusion; but it involves a difficulty quite as serious, for everything in the poems, as has been pointed out, indicates that the relatives always decided whether they would accept the blood-price or not.

But the line is capable of quite another rendering. Lipsius has shown that, in accordance with Homeric usage, *δίκην εἰπεῖν* may be rendered "plead a cause." He cites *Ἀχιλλῆα δίκη ἡμείψατο*, "answered Achilles with a claim of right," and *δικας εἶποντο ἄνακτα*, "they were asking the king concerning their rights." To these may be added *ἐπὶ ῥηθέντι δικάω* "a (fair) claim of right." Both explanations may be linguistically correct,<sup>2</sup> but Lipsius finds in *μετὰ τοῖσι* a decisive argument: "Die Bedeutung der Präposition aber lässt nur die Wiedergabe mit 'vor,' 'bei' zu und verbietet die Gleichsetzung mit einem Genetiv." *μετὰ τοῖσι* simply means "in court." The two talents, then, must go to the man in whose favor the verdict was given.<sup>3</sup>

<sup>1</sup> *Op. cit.*, pp., 125 ff.

<sup>2</sup> But compare the remarks of Laurence, *op. cit.*, p. 128, based on the assertions of Shilleto that the ordinary usage of *δίκην εἰπεῖν* is not "to pronounce judgment" but "to plead a cause," and that indeed there is no instance of the phrase being used in any but the latter sense.

<sup>3</sup> Cf. the parody of this passage in Lucian *Piscator*, 41.



Although Maine is wrong about the destination of the two talents, he is undoubtedly correct in thinking them a sort of wager. As a wager a talent is not excessive.<sup>1</sup> The tripod or the caldron which are mentioned in the proposed wager between Ajax and Idomeneus might cost more than two talents apiece, as may be inferred from the prize list in the chariot race.<sup>2</sup>

The wager has been compared with the *poena sponsionis et restipulationis* of Roman law which went to the successful litigant. In Attic law it survives in a modified form in the *παρακαταβολή*, deposited by the plaintiff and forfeited in case of failure either to the state or to the defendant, according to the nature of the case.<sup>3</sup> In effect the wager corresponds to the damages which, according to Homeric practice, usually accompanied restitution and redress.

The most plausible explanation of the trial-scene seems, then, to be as follows. A man had been killed sometime before the trial, and his kinsmen and friends rallied to take vengeance on the slayer, whose friends also supported him in great numbers. Finally the bulk of the community was ranged on one side or the other. A compromise seemed advisable, and an agreement to settle the blood-feud for a sum of money was reached. The scene on the shield presents the principals disputing about the payment. The one claims that he has paid the money in full; the other denies it. In the market place each man, surrounded by his partisans who had sided with him in the earlier stages of the feud, tells his side of the case to those within hearing. At length one challenges the other to stake a talent apiece and refer the dispute to arbitration. An agreement to abide by the verdict is made and confirmed by oaths. The talents constituting the wager are deposited before the elders seated in the place of justice, each with a scepter, the emblem of the judicial office. Around them surge the partisans so closely that the heralds are

<sup>1</sup> The wager theory is followed by Maine, Bonner, Calhoun, and by Fanta (*op. cit.*, p. 86).

<sup>2</sup> *Il.* xxiii. 262 ff.

<sup>3</sup> Meier and Schoemann, *Der Attische Process*, 815 ff.

obliged to restrain them. The litigants then present their cases amid the applause of their partisans. The two talents were awarded to the winner of the suit. Thus the trial-scene conforms to the common practice of settling a dispute by wager.

An obvious and weighty objection to other current interpretations of the trial-scene is that each of them represents a form of trial without parallel in Homeric practice. But the wager theory is well exemplified in the proposed settlement of the dispute between Idomeneus and Ajax by wager and arbitration. The tendency to back one's opinion by a wager is universal. Men still on occasion settle disputes as Idomeneus proposed to do. Furthermore, a trial based on a wager of money has marked affinities with other primitive forms of trial. In the trial by battle men risk loss of life or limb. In the trial by evidentiary oath there is the risk of divine punishment. In each of these three types the litigant stakes and risks something. Each appeals to a universal human instinct.

Witnesses are nowhere mentioned in Homer in connection with arbitrations. The gods in whose names oaths were sworn are called *μάρτυροι* or *ἐπιμάρτυροι*. They are not only witnesses but sureties or guarantors of the compact or treaty, because they punish perjurers.<sup>1</sup> For the person in whose interest they act they are protectors. Zeus is called the *μάρτυρος* of strangers, because, when called upon to witness a wrong done to the stranger, he punishes the wrongdoer.<sup>2</sup> Here we have the origin of human witnesses and sureties. In place of gods, men are summoned to the making of a contract to insure its provisions being carried out. But this stage was not reached in the age of Homer.<sup>3</sup> Occasionally the word *μάρτυρος* is used of those who are familiar with some event or situation,<sup>4</sup> but they are not summoned either as formal or as

<sup>1</sup> *Il.* iii. 274 ff.; vii. 76; cf. Nägelsbach, *Homeric Theologie*, p. 265.

<sup>2</sup> *Od.* xvi. 423.

<sup>3</sup> In the "Song of Demodocus" (*Od.* viii. 266 ff.) Poseidon offered to be surety for Ares. This passage is of late origin but preserves a link in the process of development.

<sup>4</sup> *Il.* i. 338; ii. 302.

general witnesses. The word *μαρτυρία* in the *Odyssey* is not used in a technical sense,<sup>1</sup> though not far from it.

Some scholars regard the omission of testimonial evidence as purely accidental.<sup>2</sup> The fact that witnesses are known in the age of Hesiod is an unsafe ground for inference regarding the Homeric age, since the judicial system that prevailed in the time of Hesiod is considerably more advanced than that of the age of Homer. In addition to the statements of the parties the Homeric arbitrator had to rely upon what Gilbert aptly calls his *eigene Combination* (resourcefulness), or the voluntary evidentiary oath of one of the parties.<sup>3</sup>

Regular judicial processes were developed from the arbitral functions of the chiefs and elders (*ἡγήτορες ἡδὲ μέδοντες*). Even in the Homeric period there are unmistakable indications that arbitration had become a regular and normal proceeding. Odysseus, in relating his escape from Charybdis on the timbers of his wrecked ship, says:

ἦμος δ' ἐπὶ δόρπον ἀνὴρ ἀγορήθεν ἀνέστη  
κρίνων νείκεα πολλὰ δικαζομένων αἰζηῶν  
τῆμος δὴ τὰ γε δοῦρα Χαρύβδιος ἐξεφαάνθη.<sup>4</sup>

This is highly significant. The chiefs and elders, instead of waiting for calls for their services as arbitrators, held more or less regular sittings in the agora to settle the disputes of all who might appear before them. In the course of a single session lasting the better part of a day they disposed of many cases (*κρίνων νείκεα πολλὰ*). Several considerations impelled the authorities to facilitate in this fashion recourse to arbitration. In matters of religion the Homeric community acted as a group to secure the favor of the gods by public sacrifices.<sup>5</sup> In war they had to co-operate for protection against their neighbors who were always potential enemies. Quarrels and strife between individuals tended to weaken

<sup>1</sup> *Od.* xi. 325. *πάρος δέ μιν* (Ariadne) *Ἄρτεμις ἔκτα Δίῃ ἐν ἀμφιρύτῃ Διονύσου μαρτυρήσει.*

<sup>2</sup> Gilbert, *op. cit.*, p. 467; Buchholz, *op. cit.*, p. 87.

<sup>3</sup> Cf. the judgment of Solomon, I Kings 3:16 ff.

<sup>4</sup> *Od.* xii. 439 ff.

<sup>5</sup> Cf. the description of the sacrifice to Poseidon by Nestor and the Pylians, *Od.* iii. 5 ff.

the solidarity of the group. It was clearly in the public interest to reduce as far as possible these potential sources of danger to the community. And so it was only natural that public opinion should increasingly favor arbitration as an effective means of settling disputes. Furthermore, it was in the interests of the ruling class to foster and encourage arbitration. The settlement of disputes in this fashion would increase their political power and enhance their prestige in the eyes of the community. Another important factor in the situation was the force of habit and example. In due time the practice of resorting to arbitration tended to become a recognized custom; and custom in primitive communities readily hardens into law such as existed before the period of the codes.

It is not easy to determine with any degree of certainty the point at which arbitration became in practice obligatory. In the seventh century written codes made their appearance in various parts of Greece. A striking feature of these codes is the exercise of judicial functions by magistrates.<sup>1</sup> In the matter of judicial machinery and procedure the codes, as a rule, simply recorded current practice. Novelty was usually confined to the substantive law. Obviously, for a considerable period before the codification of the law it had been the duty of magistrates to adjudicate cases. The earliest datable code is the Athenian code of Draco in 621 B.C. By this time the thesmothetae<sup>2</sup> had been instituted as special judicial officers to aid the regular magistrates. The institution of this board implies a fully organized judicial system in which the magistrates κύριοι ἦσαν τὰς δίκας αὐτοτελεῖς κρίνειν.<sup>3</sup> A similar inference has been drawn from the archon's proclamation guaranteeing the security of property rights.<sup>4</sup> The archon as chief annual magistrate may go back to 682 B.C. It may fairly be assumed that the archon in his capacity as judge simply continued the judicial functions of the later king-

<sup>1</sup> Cf. Meyer, *op. cit.*, II, 572. Cf. *infra*, p. 77.

<sup>2</sup> Cf. *infra*, pp. 85 ff.

<sup>3</sup> Aristotle *Ath. Pol.* iii. 5.

<sup>4</sup> *Ibid.*, lvi. 2. Cf. Busolt, *Griechische Geschichte*, II, 169; Lipsius, *Das Attische Recht*, p. 11. Cf. *infra*, p. 62.

ship. If this be true, a virtual compulsory legal process had been evolved in Athens about the beginning of the seventh century. This time falls well within the period which for convenience may be called the "age of Hesiod," about 750-650 B.C. The chief source for this period is Hesiod's *Works and Days*, supplemented by the prooemium to the *Shield of Heracles* based on Hesiod's *Catalogue of Women*. These sources enable us to recover some of the main features of the Boeotian judicial system as Hesiod knew it.

Hesiod reveals a much more advanced stage of legal development than is found in the Homeric poems. It was customary for litigants to substantiate their statements with testimonial evidence. "Even when dealing with your brother," says Hesiod, "summon a witness but do it with a smile."<sup>1</sup> The smile was intended to cover the insistence on what might under the circumstances be regarded as a useless, if not insulting, formality. Hesiod had learned this lesson from his experience with his own brother. That witnesses might give their testimony under oath is made plain by the poet's denunciation of the witness who knowingly commits perjury and thereby does an injury to justice: "But whoever deliberately lies in his witness and forswears himself, and so hurts Justice and sins beyond repair, that man's generation is left obscure thereafter."<sup>2</sup> The statement that "retribution for perjury attends crooked decisions"<sup>3</sup> may refer either to the witness oath or to the oath of a party, evidentiary or confirmatory. It seems likely that some provision had been made for the regular administration of justice in Boeotia. Within each district the petty chiefs composing the dominant aristocracy met with more or less regularity in the chief city and adjudicated disputes. Thither flocked the country peo-

<sup>1</sup> Hesiod, *Works and Days*, 371.

<sup>2</sup> *Ibid.*, 282 ff.: (Evelyn-White's translation)

ὅς δέ κε μαρτυρήσῃ ἐκὼν ἐπίορκον ὁμόςσας  
ψεύσεται, ἐν δὲ δίκῃν βλάβας ἠέκεστον ἀασθῇ,  
τοῦ δὲ τ' ἁμαυροτέρῃ γενεῇ μετόπισθε λήλειπται.

<sup>3</sup> *Ibid.*, 219:

αὐτίκα γὰρ τρέχει Ὀρκος ἅμα σκολιῇσι δίκῃσιν.

Cf. Lipsius, *op. cit.*, p. 11, n. 41.

ple from the villages either as litigants or as listeners; and a city agora on court day must have presented a scene strikingly similar to that pictured on the shield of Achilles.<sup>1</sup> It is interesting to note that the processes of law were open to strangers as well as to citizens.<sup>2</sup> Access to the courts of a foreign city was commonly regulated by special treaties.

Hesiod warns his brother of the dangers of indulging the litigious spirit that was characteristic of the period:

Perses, lay up these things in your heart, and do not let that Strife who delights in mischief hold your heart back from work, while you peep and peer and listen to the wrangles of the court-house [νείκε' ὀπιπεύοντ' ἀγορῆς]. Little concern has he with quarrels and courts [νείκεων τ' ἀγορέων τε] who has not a year's victuals laid up betimes, even that which the earth bears, Demeter's grain. When you have got plenty of that, you can raise disputes and strive to get another's goods [νείκεα καὶ δῆριν ὀφέλλοις]|| κτήμασ' ἐπ' ἀλλοτρίοις].<sup>3</sup>

This picture presents an element in litigation not found in the age of Homer. Court sessions in the agora had become so usual and frequent that those who resorted there regularly as onlookers and listeners spent so much time that they were in danger of neglecting their own affairs. This is perhaps not entirely incompatible with the situation as disclosed in the Homeric poems, but the suggestion that one may acquire a taste for litigation on his own account in the hope of acquiring other people's property implies quite a different system. One is inevitably reminded of the denunciation of the sycophants and the evil influences of the agora upon the young men, which are found in the orators.<sup>4</sup> Under a system of purely voluntary arbitration one could scarcely hope to get possession of other people's property by going to law. The proposed victim had only to refuse to submit the dispute or quarrel to arbitration.

Those who give judgments in the court sessions of the

<sup>1</sup> Hesiod, *Works and Days*, 27. Askra, the poet's native place, belonged to Thespiæ (Lipsius, *op. cit.*, p. 11). But cf. Steitz, *Werke und Tage des Hesiods*, p. 32.

<sup>2</sup> Hesiod, *Works and Days*, 225 ff., 327; cf. Glotz, *Solidarité*, pp. 220 ff.

<sup>3</sup> Hesiod, *Works and Days*, 27 ff., Evelyn-White's translation.

<sup>4</sup> Isocrates vii. 48; cf. Aristophanes, *The Clouds*, 991; *The Knights*, 1373 ff.; Plato *Theætetus*, 173c.

agora are constantly described as "bribe devouring kings" (*δωροφάγοι βασιλῆες*) who oppress the people by their "crooked decisions" (*σκολιῇσι δίκῃσι*).<sup>1</sup> These repeated charges cannot be based solely upon Hesiod's own experience with his brother. Obviously, bribery and crooked decisions constituted a general abuse. The nobles could not have made a practice of accepting bribes and rendering corrupt decisions as arbitrators. Even a few known instances of corruption would seriously interfere with sessions of arbitrators in the agora. But a general reputation for accepting bribes and rendering crooked decisions would have made recourse to arbitration a comparatively rare occurrence. No community would voluntarily continue to submit its differences to men who were notoriously corrupt. The remedy was in their own hands. They could easily choose impartial judges from the populace and ignore the sessions of the nobles.

Hesiod's litigation with his brother Perses bears out the conclusion that the adjudication of cases by the nobles had to be accepted and their judgments respected. The brothers had divided their inheritance. But Perses was dissatisfied. Profiting by the lessons he had learned in the agora, he entered suit, so to speak, and won a larger share of the patrimony. The judgment of the court, influenced by bribes, was duly enforced.

ἤδη μὲν γὰρ κλῆρον ἔδασσάμεθ', ἀλλὰ τὰ πολλὰ  
ἀρπάζων ἐφόρεις μέγα κυδαίνων βασιλῆας  
δωροφάγους οἳ τῇνδε δίκην ἐθέλουσι δίκασσαι.<sup>2</sup>

But even so, Perses was not satisfied and proposed to engage in further litigation. Hesiod, instead of refusing to appear

<sup>1</sup> Hesiod, *Works and Days*, 220 f.:

τῆς δὲ Δίκης ῥέθους ἐλκομένης, ἧ κ' ἄνδρες ἄγωνσι  
δωροφάγοι, σκολιῆς δὲ δίκης κρίνωσι θέμιστας,

and 263 f.:

ταῦτα φυλασσόμενοι, βασιλῆς, ἴθινετε δίκας,  
δωροφάγοι, σκολικῶν δὲ δικῶν ἐπὶ πάγχυ λάθεσθε.

The *βασιλῆες* are not kings but nobles (Steitz, *op. cit.*, p. 33). Cf. *Works and Days*, 38 f., 248 ff.

<sup>2</sup> Hesiod, *Works and Days*, 37-39. ἀλλὰ τὰ (l. 37) is Guyet's emendation for ἄλλα τε of the MSS; Schoemann emended the MSS reading ἰθέλουσι δίκασσαι (l. 39), to ἰθέλουσι δίκασσαν.

again before the judges, as he might have done had they been arbitrators, was content to appeal to his brother to settle their dispute by impartial award (ἀλλ' αἰθι διακρινώμεθα νεῖκος || ἰθείησι δίκης).<sup>1</sup> In effect he is proposing arbitration by agreement as an alternative to submitting the case to the adjudication of the nobles. This seems to be the natural interpretation of Hesiod's account.<sup>2</sup> Other explanations that have been suggested do not alter the situation materially.<sup>3</sup> If Hesiod really believed that the chiefs accepted bribes and rendered corrupt judgments, it is hard to understand why he should ever have consented even once to accept them as arbitrators. If Homeric views and practices still prevailed, he could have refused to do anything further or he could have proposed other arbitrators. As he did neither in the first case, one is constrained to believe that he had no choice in the matter.

It is generally agreed that the administration of justice in the age of Hesiod is much more advanced than in the age of Homer.<sup>4</sup> But Steinwenter has objected to the use of the phrase "compulsory process of law" to characterize this development. Regarding the picture in the *Theogony* of Hesiod<sup>5</sup> of the ideal king dispensing justice (διακρίνοντα θέμιστας || ἰθείησι δίκησιν), he remarks as follows: "Danach beruht aber die Unterwerfung der Parteien unter dem Spruch des Königes nicht auf einem staatsrechtlichen Im-

<sup>1</sup> *Ibid.*, 35-36. For the meaning of αἰθι (*here*), see Steitz, *op. cit.*, p. 32; Hays, "Notes on the *Works and Days* of Hesiod" (University of Chicago dissertation, 1918) takes it in a temporal sense.

<sup>2</sup> The scholiast read θέλουσι δικάσσαι and understands that a second suit is pending. Cf. Scholium on line 39: δωροφάγους : οἳ τε προθύμους ὄντας καὶ αἰθὺς δικάζειν τῷ Πέρσῃ καὶ τῷ Ἡσιόδῳ διὰ τὴν τῶν δώρων ἐλπίδα. So also Steitz, *op. cit.*, p. 24; Schwartz, *Charakterköpfe aus der antiken Literatur*, p. 8.

<sup>3</sup> Ehrenberg, *op. cit.*, p. 63, assumes that Hesiod has appealed the case. Steinwenter, *op. cit.*, p. 41, also thinks that the case was reopened by Hesiod but finds it difficult to decide on the nature of the issue. Kirchhoff, *Hesiodos' Mahnlieder an Perses*, p. 43, believes that the case has been heard but not yet decided; cf. Wilamowitz, *Hesiodos Erga*, p. 46.

<sup>4</sup> Lipsius, *Das Attische Recht*, pp. 10 ff.; Steinwenter, *op. cit.*, p. 42. Bonner, *Class. Phil.*, VII, 17, first used the expression "compulsory process of law." Bréhier, *Rev. historique*, LXXXV, 12 ff.

<sup>5</sup> 81 ff.



perium, welches das Urteil als Amtsbefehl erscheinen liesze, sondern nur auf der Kraft der Argumente und der Ehrfurcht oder wohl auch Furcht vor den Königen."<sup>1</sup> From a strictly legal and constitutional point of view this is quite true. Indeed, there could not be a *staatsrechtliches Imperium* until the lawgivers had reduced current practices and customs to writing, with such additions as they deemed desirable. But there is a danger of missing important developments in the early judicial history of the Greeks if we insist too rigidly upon the application of modern legal and constitutional standards. The judicial powers exercised by the authorities during the age of Hesiod were not conferred upon them by the action of any sovereign body in the state. They were derived rather from tradition, custom, and precedent. The important point was that the Boeotian peasants submitted to their judgments, as Steinwenter points out. "Die 'krummen Sprüche' der bestochenen Richter hat der Bauer eben anzuerkennen, weil er sich vor dem Adeligen ducken musz, nicht aber weil eine mit Zwangsgewalt ausgestattete Rechtsordnung es gebietet."<sup>2</sup> This statement is not essentially different from the view set forth above. It is to be regretted that the form of trial described by Hesiod cannot be designated by some convenient term that would mark it off both from Homeric arbitration and from the more highly developed Athenian legal process of the fourth century. Since the expression "compulsory process of law" has implications for the modern reader even beyond the Athenian conception of a legal process, it may be better to use the designation "obligatory arbitration."<sup>3</sup> It emphasizes the degree of compulsion achieved by growing custom backed by public opinion and fostered by the government. It carries also the idea of equitable settlement inherent in arbitration as distinguished from strict legal adjudication.

<sup>1</sup> Steinwenter, *op. cit.*, p. 41.

<sup>2</sup> *Ibid.* The rather narrow interpretation Steinwenter puts upon *wahre Judikationsgewalt* is shown by the fact that he finds only the beginnings of real judicial power in the code of Draco.

<sup>3</sup> Bonner, *Lawyers and Litigants in Ancient Athens*, p. 31.

It is useless to speculate how proceedings were initiated<sup>1</sup> or how judgments were executed. Even in fourth-century Athens these duties devolved upon the parties in the first instance. It may be observed that in the age of Homer there could be no real assurance that an award of an arbitrator would be enforced. Even agreements fortified with oaths and sureties might not avail. In the end the only compelling forces were custom and public opinion. In a closely knit ancient community a man could not lightly disregard these powerful forces.

The practice of settling a dispute by means of an evidentiary oath was still in common use. This is made clear by the following couplet:

βλάψει δ' ὁ κακὸς τὸν ἀρείονα φῶτα  
μύθοισιν σκολιοῖς ἐνέπων, ἐπὶ δ' ὄρκον ὁμείται.<sup>2</sup>

Tzetzes explains this passage as meaning that a man deprives another of some property and, when called to account, swears that he is innocent, just as Hermes offered to swear that he did not steal the cattle of Apollo. Even if the *Hymn to Hermes*, in which the dispute between Hermes and Apollo is described, is considerably later than the poems of Hesiod, it may be safely used to add some details to the picture of legal procedure in the age of Hesiod. For it no doubt reflects in the main the practice in vogue down to the period of written codes. Apollo, on discovering the loss of the cattle, at once set out to trace them and secure witnesses to establish the identity of the culprit.<sup>3</sup> So important was testimonial evidence that rewards for information leading to the finding of the thief were sometimes offered.<sup>4</sup> If witnesses could be produced, the accused had the option of returning the

<sup>1</sup> It has been suggested that royal heralds were used to summon witnesses and parties (Thonissen, *Le droit pénal de la république athénienne*, p. 31).

<sup>2</sup> *Works and Days*, 193 f.; cf. 322.

<sup>3</sup> *Hymn to Hermes*, 185 ff.

<sup>4</sup> *Ibid.*, 264 ff., where Hermes says,

οὐκ ἂν μηνύσαιμι, οὐκ ἂν μήνυτρον ἀροίμην.

Cf. Hesiod *Frag.*, 153, where he is said to have offered Battus (cf. *Hymn to Hermes*, 87 ff.) a reward for information in order to test him.

booty with suitable damages or of facing almost certain defeat in court. Apollo, though he was unable to secure a witness, confidently charged Hermes with the theft. Irritated by the accusations, Hermes threatened to bring the matter before Zeus, and offered to swear that he was innocent. It is not stated that Apollo agreed to accept the oath as decisive, as did Menelaus when he challenged Antilochus to swear that he had not won the race by a foul. At any rate, the case was taken before Zeus for adjudication:

αἶψα δ' ἵκοντο κάρηνα θυώδεος Οὐλύμποιο  
 ἐς πατέρα Κρονίωνα Διὸς περικαλλέα τέκνα.  
 κεῖθι γὰρ ἀμφοτέροισι δίκης κατέκειτο τάλαντα.<sup>1</sup>

The words *δίκης τάλαντα* are commonly explained as the scales of justice, but the view of Ridgeway<sup>2</sup> that *τάλαντα* were sums of money deposited by the litigants as in the trial pictured on the shield of Achilles seems preferable. In this

<sup>1</sup> *Hymn to Hermes*, 322 ff.

<sup>2</sup> "Homeric," *Jour. of Philol.* XVII, 111 f. He points out that *κατέκειτο* recalls *κεῖτο* in the Homeric trial-scene in the sense of "deposited":

κεῖτο δ' ἄρ' ἐν μέσσοισι δῶν χρυσοῖο τάλαντα.

In the *Iliad* (viii. 69 ff.; xxii. 209 ff.) Zeus uses scales to weigh the fates of men, never to decide a dispute between gods. "Scales of justice" are not mentioned in Homer. But against this interpretation may be urged the consideration that although Apollo and Hermes are said to have resorted to Zeus because (γάρ) their talents had already been deposited, the story contains no previous mention of this fact. Indeed such a possibility seems to be excluded. On the other hand, *ἀμφοτέροισι*, which is quite appropriate if the reference is to a deposit of money, is without point in a reference to scales of justice. Furthermore, Zeus does not use the scales as he does in the *Iliad*, but proceeds to pronounce judgment after hearing the pleas of the litigants. Later poets used *δίκης τάλαντα* in the sense of "scales of justice." But this may be due to a misapprehension. The poet, using the expression to indicate that they joined issue before Zeus as judge, added *δίκης* to make this clear. Later writers, thinking the reference was to the scales of Zeus, perpetuated the phrase *δίκης τάλαντα* in the sense of "scales of justice":

οὐ γὰρ ἀφανρῶς  
 ἐκ Διὸς ἰθείης οἶδε τάλαντα δίκης·

—*Anth. Pal.* vi. 267. 3 f.

Cf. Aesch. *Agam.*, 250.

The passage thus interpreted, however, furnishes no support for the view that the Homeric talents went to one of the judges, as Ridgeway argues. Cf. Ferrini, *op. cit.*, p. 45; also Bréhier, *Rev. historique*, LXXXIV, 29, who says that the talents were destined for Zeus if he gave a decision agreeable to the parties. The parties were not obliged to submit to the sentence.

case, however, the talents are not wagers. Under compulsory arbitration, wagers were not needed to induce an unwilling opponent to appear in court. Among primitive peoples customs are not easily discarded; they are more likely to be modified and adapted to changed conditions. On the introduction of compulsory arbitration the custom of depositing wagers was continued, though the need for it no longer existed. It may very well have been that for a time the money went to the successful litigant as a species of damages, but its conversion into court fees could not long have been delayed when the aristocracy controlled the courts. Under these circumstances damages would be assessed by the court.<sup>1</sup>

After the payment of the money into court, Apollo proceeded to plead his case. Hermes denied the charge and affirmed his innocence with an oath.<sup>2</sup> Apparently this was not an evidentiary oath, for Hermes was not acquitted as he would have been had Apollo agreed to stake the issue on an oath. The oath was simply a means of lending weight to the litigant's plea.

Courts did not, on their own motion, take cognizance of wrongs done to individuals on the theory that they were a menace to society. Hesiod, it is true, constantly insists that wrongdoing of individuals would inevitably bring down the wrath of the gods upon the whole community.<sup>3</sup> Such passages as this and his reference to the popular outcry against those who thwarted the ends of justice show that public opinion in his day was active just as in the Homeric age, and might manifest itself in popular action.<sup>4</sup> Thus the same spirit which has been discussed in the Homeric age as lying at the basis of criminal law is apparent in the time of Hesiod, although there is as yet no organized criminal law.<sup>5</sup>

For various wrongs which Hesiod mentions—ill treat-

<sup>1</sup> Glotz, *Solidarité*, p. 149, regards the lyre given by Hermes to Apollo as damages. Zeus in his decision said nothing about damages. Hermes gave the lyre of his own free will. The incident throws no light on the purpose of the talents.

<sup>2</sup> *Hymn to Hermes*, 383-84; cf. 274 ff.

<sup>3</sup> *Works and Days*, 240; cf. Thonissen, *op. cit.*, p. 26.

<sup>4</sup> Hesiod, *Works and Days*, 220.

<sup>5</sup> Cf. *supra*, p. 22.

ment of strangers, suppliants, parents, or orphans<sup>1</sup>—redress could usually be obtained most easily by legal proceedings. Hesiod's dispute with his brother regarding the division of their patrimony was in the first instance settled in court.

But, side by side with obligatory arbitration, voluntary arbitration flourished just as it did under the highly organized judicial system of Athens. Thus Hesiod proposed to his brother to submit their differences to arbitration rather than to resort again to the court of "bribe-devouring kings."<sup>2</sup>

Self-help continued to play an important part in the redress of wrongs. An injured man always sought to gain partisans among his kinsmen and neighbors. Hesiod emphasizes the folly of relying too much on one's relatives, and the advantages of being on good terms with neighbors. Then, in time of need neighbors will come in haste to assist. Relatives are likely to be more deliberate.<sup>3</sup> In all probability self-help is implied in the statement that a man who has good neighbors will never lose his cattle;<sup>4</sup> that is to say, they will aid him in recovering stolen animals by the use of force. They could be useful as witnesses by identifying the raider. Custom required that witnesses should accompany a man when he searched the premises of the suspected thief.<sup>5</sup>

In case of adultery the injured husband would naturally exact satisfaction from his wife's paramour without recourse to the courts, either by slaying him, as did Hyettus,<sup>6</sup> or by forcing him to pay substantial damages (*μοιχάρια*), like Hephaestus in the lay of Demodocus. The slayer of an adulterer, however, became involved in a blood-feud with the relatives. There was a possibility of litigation in case the compensation agreed upon was not paid, as in the trial-scene.

<sup>1</sup> Hesiod, *Works and Days*, 327 ff., warns his brother against these wrongs as well as against adultery. They are severely punished by the gods.

<sup>2</sup> *Ibid.*, 35 f.

<sup>3</sup> *Ibid.*, 342 ff.; cf. Glotz, *Solidarité*, pp. 193 ff.

<sup>4</sup> *Works and Days*, 348.

<sup>5</sup> Apollo made a thorough search of the abode of Maia (*Hymn to Hermes*, 246 ff.). Hermes objected that the search was conducted without witnesses (*ibid.*, 372; cf. 385 f.); cf. Glotz, *op. cit.*, pp. 203 ff.

<sup>6</sup> Hesiod *Frag.*, 144.

In cases of homicide the Homeric practice was followed. Thus Amphitryon, who slew Electryon, his kinsman and father-in-law, went into banishment in Thebes. His wife Alcmena, daughter of Electryon, accompanied him. Later she induced him to avenge the death of her brothers. It would seem that his going into exile freed him from any fear of vengeance at the hands of the other relatives of his victim. Only in this way can we reconcile Alcmena's strong desire for vengeance on her brother's slayers with her loyalty to the man who slew her father.<sup>1</sup> All homicides were regarded alike. Hyettus, who slew Molurus, whom he surprised in adultery with his wife, was obliged to flee from Argos to Orchomenus, notwithstanding the ample excuse for slaying Molurus.<sup>2</sup>

It is clear from the foregoing that through the age of Hesiod, at least, homicide was still viewed wholly as the concern of the relatives of the victim. On the other hand, from the earliest period there was a growing feeling that any action that was opposed to the good order and well-being of the state should be punished by the state. It is obvious, then, that the germs of criminal law are to be found while homicide was still entirely a matter for the family to deal with. The conception of crime and the origin of criminal law, then, are not to be found in actions for homicide.<sup>3</sup> This being the case, it remains to consider two things in connection with homicide. When did the doctrine of pollution, attached to the homicide, become current; and why did the state undertake the settlement of homicide cases?

The notion that homicide involved pollution was not known in the Homeric age, but it was firmly established in the time of Draco. Between these two periods there is little evidence by which the exact time of the appearance and the development of the doctrine can be fixed. By the time of Aeschylus the idea had already assumed an air of great an-

<sup>1</sup> *Shield of Heracles*, 9 ff., 80 ff.

<sup>2</sup> Hesiod *Frag.*, 144. Calhoun, *Criminal Law*, p. 26, uses this fragment to show that the idea of pollution from homicide was not widespread in the age of Hesiod.

<sup>3</sup> Cf. Calhoun, *Proceedings*, pp. 87 ff.; *Criminal Law*, pp. 16 ff. and 26 ff.

tiquity. It is difficult to account for this unless it is supposed that the doctrine had been widely disseminated long before Aeschylus' day. In the amnesty law which was passed before the reforms of Solon, those are specifically excluded from the benefits of the amnesty who are in exile as the result of conviction for homicide by any of the homicide courts.<sup>1</sup> Certainly the exclusion of these Athenians is due solely to the fact that their presence would pollute the soil of Attica. They would not be excluded to prevent blood-feud, because at this time the state had control in homicide cases. In the code of Draco there is a provision that anyone could prosecute a homicide who illegally returned to Attic soil.<sup>2</sup> Here, again, the reason is undoubtedly pollution. The fact that Draco embodied the idea in a law indicates that the doctrine was a familiar and established one. The familiarity of the idea of pollution in the second half of the seventh century is then firmly established. It is often said on far slighter evidence that moral pollution resulting from homicide was familiar to the Greeks of Hesiod's day. The statement is based on the following arguments. Two of the Greek prefaces to the *Shield of Heracles* state that Amphitryon went into exile in Thebes in accordance with a custom requiring those who started a πόλεμος ἐμφύλιος to undergo purification for a period of three years. In the poem itself nothing is said about pollution or purification.<sup>3</sup> A scholiast to *Iliad* ii. 336 mentions purification in an account of the sack of Pylos by Heracles and says that Hesiod tells the story in the *Catalogue*. It cannot, of course, be assumed that Hesiod mentioned purification. In his summary of the *Aethiopis* of Arctinus,<sup>4</sup> Proclus says that Achilles was obliged to go to Lesbos in order to be freed from the pollution resulting from the slaying of Thersites. Calhoun<sup>5</sup> attacks this passage as evidence for the Hesiodic age on the ground that we do not know under what

<sup>1</sup> Plutarch *Solon*, xix. Cf. *infra*, pp. 104 ff., for a discussion of the amnesty law.

<sup>2</sup> *CIA* i. 61.

<sup>3</sup> *Shield of Heracles*, Hypotheses Δ, ll. 13 ff.; E, ll. 12 ff.

<sup>4</sup> Kinkel, *Epici Graeci*, 33.9 ff. The *fluor* of Arctinus is 750 B.C.

<sup>5</sup> *Criminal Law*, p. 28.

circumstances the slaying occurred or how much of the pollution idea was due to Proclus, who had frequently encountered it in the treatment of homicide by later authors. Calhoun places far too much emphasis on this passage. No matter which way it be interpreted, it is in no way essential to his thesis. It is true that the evidence is not as certain as it would be if Arctinus' text were extant. Yet it seems more probable that Proclus told the story as he found it than that he introduced the episode from his familiarity with the idea of pollution in later authors.<sup>1</sup> In any event, in view of the thorough familiarity with the doctrine by the end of the seventh century, the doctrine of moral pollution must have become widely current among the Greeks very shortly after the time of Hesiod, if not actually in his day. The exact date is of slight consequence.<sup>2</sup>

There appear to be two reasons for the intervention of the state in homicide cases.<sup>3</sup> The first is the idea of pollution attaching to the homicide which has just been discussed. As the doctrine of pollution spread, the state was bound, for self-protection, to find some means of ridding the land of a polluted person in case relatives of the victim failed to act.

The other motive for state intervention is the prevention of blood-feud. Homicide is not viewed as an injury to the state until it is felt that the death of the victim has in some way injured the state. In the aristocratic society of Homeric times it was impossible that the death of a man of the people, for instance, should mean anything to the ruling class. Vengeance for his death was the business solely of his family. The state would not be concerned even if the homicide led to a blood-feud. Similarly, if a member of one of the noble families was slain, the family, with its innate feeling of soli-

<sup>1</sup> Cf. Halliday, review of Calhoun, *Class. Rev.*, XLI, 181.

<sup>2</sup> Cf. Bréhier, *Rev. historique*, LXXXV, 13; Glotz, *Études*, pp. 38 ff. The idea of pollution from homicide and the subsequent purificatory rites are closely bound up with the cult of Apollo Catharsios, which does not appear in Homer. The conception of miasma is closely associated with the chthonic powers, the worship of which did not interest Homer. Farnell, *Greek Cults*, IV, 298, regards the post-Homeric development of cathartic ceremonies in connection with the ritual of Apollo as a revival of the ghost cult which existed in pre-Homeric times.

<sup>3</sup> Cf. Meyer, *op. cit.*, II, 575.



clarity, would set about obtaining requital. It is true that each family might enlist its friends, and the affair might develop into a kind of civil war involving the destruction of many on both sides. But it was always the family that led. There was for a long time apparently no thought of peaceful adjudication of the matter. There was only one thing to be done—the family must obtain vengeance for its injured member. But in the fact that people generally took sides in the homicide of an important person may be seen the foreshadowings of state intervention. The nearest approach to this situation in Homer is the action of the assembly which determined the fate of Odysseus after he had slain the suitors. The strong popular feeling aroused was undoubtedly due to the wholesale character of the slaughter. There came a day, however—it is impossible to say just when—when long-continued blood-feud came to be recognized as a distinct menace to the welfare of the state. Then the state definitely assumed control. This is well brought out by the Argive statute to which Euripides refers:

“By exile justify, not blood for blood.  
Else one had aye been liable to death  
Still taking the last blood-guilt on his hands.”<sup>1</sup>

It is at this time that various types of homicide were differentiated.

<sup>1</sup> *Orestes*, 515 ff.

## CHAPTER II

### THE UNIFICATION OF ATTICA<sup>1</sup>

In the Heroic Age, Attica, according to tradition, was divided into a number of petty principalities<sup>2</sup> loosely organized for defensive purposes under the suzerainty of the kings of Athens. Each community had its own magistrates and town hall (*πρυτανείον*) and managed its local affairs, including the administration of justice, independently of Athens. But unifying forces were at work.<sup>3</sup> Similarity of language and institutions facilitated the formation of groups of smaller communities for defensive or religious purposes, such as the Tetrapolis of Marathon, Oenoe, Tricorythus, and Probalinthus. The tribal system also advanced the cause of unity. The four Ionic tribes, said to have been introduced by Ion, were local. Each included within its boundaries several *πόλεις*. As the organization of the military forces was on a tribal basis, the citizens of different communities were closely associated in war under the leadership of the tribal kings (*φυλοβασιλείς*).<sup>4</sup> The final step in the process was taken by Theseus, who succeeded, without the employment of force, in bringing the nobles together into Athens, which became the capital city; the common people for the most part continued to reside in the country,<sup>5</sup> but

<sup>1</sup> Aristotle added to his historical account of the development of the Athenian constitution a convenient summary of the most important political changes (*Ath. Pol.* xli). As legal and constitutional changes are generally closely connected, Aristotle's summary marks the most important milestones in Athenian judicial history down to the restoration of democracy in 403. In the main, Aristotle's division into periods will be followed in the succeeding chapters.

<sup>2</sup> According to Philochorus (quoted by Strabo ix. 1.20), there were twelve cities in Attica. Cf. De Sanctis, *Storia della repubblica Atiniese*<sup>2</sup>, pp. 26 ff.; Busolt, *Griechische Geschichte*, II<sup>a</sup>, 69 ff.; *Cambridge Ancient History*, III, 577 ff.; Busolt-Swoboda, *Staatskunde*, II, 776, n. 4, for bibliography on the *Synoikismos* of Attica.

<sup>3</sup> De Sanctis, *op. cit.*, pp. 28 ff.

<sup>4</sup> Meyer, *Geschichte des Altertums*, Vol. II, sec. 205.

<sup>5</sup> Thucydides ii. 15. 2. Cf. *CAH*, III, 579; De Sanctis, *op. cit.*, p. 23.

resorted to the capital for litigation and the exercise of such political rights as they possessed in the reorganized state. Henceforth, all inhabitants of Attica were Athenians. Such is the story of the unification of Attica that was current in the fifth century.

In Homer, Athens is the most important city of Attica. In fact, it is the only one mentioned in the catalogue. It is described as a "well-built town" with "broad streets."<sup>1</sup> Its inhabitants are the "folk of Erechtheus." Sunium<sup>2</sup> was included within its territories as the epithet ἄκρον 'Αθηνέων seems to indicate. Marathon is mentioned in the *Odyssey* in connection with Athens, but with no indication of its relationship.<sup>3</sup> The archaeological evidence confirms the testimony of Homer that Athens was the most important city in the peninsula.<sup>4</sup> Thucydides accepts the common tradition regarding the political situation in Attica. As evidence of the independence of the cities of Attica, he cites the fact that they sometimes made war on each other.<sup>5</sup> The festival known as ξυνοικία he regards as having been instituted by Theseus in commemoration of the unification of Attica. Aristotle accepts the tradition regarding Theseus. His treatment of the early constitution is available only in excerpts; but in his summary of the constitutional changes in Athens, he starts with the settlement of Ion and the institution of the four tribes.<sup>6</sup> The theory has been advanced that the festival ξυνοικία was in commemoration, not of the union of Attica, but of the union of four groups settled in villages on and beside the Acropolis to form the city of Athens.<sup>7</sup> Others believe

<sup>1</sup> *Iliad* ii. 546 ff.:

οἱ δ' ἄρ' Ἀθήνας εἶχον, εὐκτίμενον ποτὶ λίθρον.

*Odyssey*, vii. 80:

ἔκετο δ' ἐς Μαραθῶνα καὶ εὐρύαγγιαν Ἀθήνην.

<sup>2</sup> *Od.*, iii. 278.

<sup>3</sup> *Od.*, vii. 80.

<sup>4</sup> De Sanctis, *op. cit.*, p. 29.

<sup>5</sup> ii. 15. For further evidence on this point, see De Sanctis, *op. cit.*, pp. 24 ff.; Meyer, *op. cit.*, sec. 223.

<sup>6</sup> Aristotle *Ath. Pol.* xli. 2. Cf. *Fragmenta* in the edition of Thalheim (Teubner, 1909), p. 107.

<sup>7</sup> Wachsmuth, *Rheinisches Museum*, XXIII, 181. He thinks that Thucydides refers only to a political union which was celebrated in the Panathenaea. Cf. *Die Stadt Athen*, i, 453. Cf. Wilamowitz, *Aus Kydathen*, pp. 116 ff.

that the *Synoecia* had nothing to do with the unification either of Athens or of Attica, but was an annual reunion of families, resembling the *Apaturia*.<sup>1</sup>

Thucydides puts the date of the unification very early in Attic history. The achievement of Theseus he regards not as the consummation of a long-continued movement toward unity but as the carrying out, at one stroke, of a great political conception by a man of vision and power. The unification, according to Thucydides, was accomplished without the use of force,<sup>2</sup> though the characterization of Theseus as a powerful king carries the suggestion that force was available. It is now generally believed that Theseus' success was the culmination of a long-continued process. The available evidence seems to support the view that the process began as early as 1000 B.C. And it may have continued for two or even three centuries.<sup>3</sup>

The Athenians were very fond of connecting Theseus with democracy. Isocrates<sup>4</sup> goes so far as to say that Theseus established a modified form of democracy; and an orator contemporary with Demosthenes<sup>5</sup> speaks in a similar strain. Euripides in the *Supplikes*<sup>6</sup> puts into the mouth of Theseus a vigorous condemnation of tyranny and a laudation of the reign of law. The oligarch of Theophrastus<sup>7</sup> denounces Theseus as the source of all the ills of the state. Plutarch<sup>8</sup> quotes Homer's designation of the inhabitants of Athens as "the people (*δῆμος*) of Erechtheus," as evidence that Theseus

<sup>1</sup> De Sanctis, *op. cit.*, p. 24.

<sup>2</sup> The peaceful character of the unification is confirmed by the fact that all inhabitants of Attica were made citizens; there were no *perioeci* as in Sparta. Cf. *CAH*, III, 579.

<sup>3</sup> De Sanctis, *op. cit.*, pp. 34 ff.; *CAH*, III, 580; Bury, *History of Greece*, p. 170; Meyer, *op. cit.*, sec. 224; Busolt-Swoboda, *op. cit.*, II, 777, put the date in the middle of the eighth century at the latest.

<sup>4</sup> *Panathenaicus*, 129, 131; *Helen*, 35.

<sup>5</sup> [Demosthenes] *lix.* 75.

<sup>6</sup> 429. The passage is quoted *infra*, p. 68. Cf. also 352 f.

καὶ γὰρ κατέστησ' αὐτὸν (τὸν δῆμον) ἐς μοναρχίαν  
ἐλευθερώσας τήνδ' ἰσχύηφον πόλιν.

<sup>7</sup> *Characters* xxix (xxvi). 11. 25 ff.

<sup>8</sup> *Theseus*, xxv. II. ii. 547.

"displayed a leaning toward the multitude and had given up his absolute rule." Democratic propagandists' seized upon and fostered this tradition, just as they magnified the services of Solon, in the interests of democracy. It was highly desirable to furnish democracy with an ancient and honorable lineage. In government and in law, ancestral and time-honored usages and institutions commanded general respect in Athens, as elsewhere both in the ancient and in the modern world.

The unification of Attica must have involved some constitutional changes. In his enumeration of the eleven changes in the Athenian constitution, Aristotle lists Theseus' reorganization as the first. He describes it as "a slight deviation from absolute monarchy."<sup>2</sup> Some details of the reorganization effected by Theseus and the concessions he made to the nobles and the lower classes are found in Plutarch. For himself the king retained the leadership in war and guardianship of the law; "to the nobles he committed the care of religious rites, the supply of magistrates, the teaching of the laws, and the interpretation of the will of Heaven. For the rest of the citizens he established a balance of privileges, the noblemen being thought to excel in dignity, the husbandmen (Γεωμόροι) in usefulness, and the handicraftsmen in numbers."<sup>3</sup> This reference to the importance of numbers and the promise of equality made to the lower classes would seem to indicate that Plutarch had in mind a popular assembly. There was provision for assemblies of the people in the local communities, for Theseus, in his canvass from community to community in the interests of his project, must have on occasion addressed the assembled inhabitants. Plutarch evidently was familiar with Aristotle's treatment of Theseus, but his main source was the traditional conception of early Athenian

<sup>2</sup> Pausanias (i. 3. 3) saw a painting representing Democracy, Demos, and Theseus in a group. He mentions the story that Theseus τὸν καταστήσαντα Ἀθηναίους ἐξ ἰσού πολιτεύεσθαι with the comment κενώρηκε δὲ φήμη καὶ ἄλλως ἢ τοὺς πολλοὺς ὡς Θησεὺς παραδοίη τὰ πράγματα τῷ δήμῳ.

<sup>3</sup> *Ath. Pol.* xli. 2: ἡ ἐπὶ Θησεῶς γενομένη (πολιτεία) μικρὸν παρεγκλίνουσα τῆς βασιλικῆς.

<sup>3</sup> *Theseus* xxiv. xxv (Perrin's translation).

history as it appeared in Istrus' summary of the Atthidographers.<sup>1</sup> On the whole, Plutarch's reconstruction is not very wide of the mark. In order to induce the petty chiefs to give up their independence, Theseus must have promised them concessions which resulted in the establishment of a modified oligarchy. And whatever degree of participation in the affairs of the state<sup>2</sup> was permitted to the common people, it was inevitable that their concentration in Athens should have enabled them to voice their aspirations and exert their influence more effectively. This appears in the success of Menestheus<sup>3</sup> in appealing to the populace for support in his efforts to supplant Theseus.

The Athenians claimed the credit of being the first to establish regular legal processes in Greece.<sup>4</sup> The fundamental requirement of a regular legal process is that it should be compulsory. An aggrieved person must have the power to force the one who has wronged him in person or in property to appear before a court, which holds regular sittings when the need arises. In the settlement of disputes and the punishment of wrongdoers, much the same system was in vogue under the early kingship as is pictured in the Homeric poems: voluntary arbitration for civil cases, self-help for homicide and other wrongs to person and property, and action by the assembled people against dangerous public offenders.

As has already been pointed out, the change from voluntary to obligatory arbitration in Boeotia seems to follow the

<sup>1</sup> Busolt, *Geschichte*, II, 57.

<sup>2</sup> Plutarch *Theseus* xxv. 1: ἔτι δὲ μᾶλλον αὐξῆσαι τὴν πόλιν βουλόμενος ἐκάλει πάντας ἐπὶ τοῖς ἴσοις.

Aristotle *Ath. Pol.*, Heraclidis Epitoma, 3: Θησεῖος δὲ ἐκήρυξε καὶ συνεβίβασε τοὺτους ἐπ' ἴση καὶ ὁμοίᾳ.

<sup>3</sup> Plutarch *Theseus* xxxii.

<sup>4</sup> Aelian *Vera historia* iii. 38: Δίκας δοῦναι καὶ λαβεῖν ἡῶρον Ἀθηναῖοι πρῶτοι.

Cicero *Pro Flacco*, 26, § 62: "Adsunt Athenienses, unde humanitas, doctrina, religio, fruges, jura, leges ortae atque in omnes terras distributae putantur."

Isocrates (*Panegyricus*, 40) claims great antiquity for the homicide trials: οἱ γὰρ ἐν ἀρχῇ περὶ τῶν φονικῶν ἐγκαλέσαντες καὶ βουλευθέντες μετὰ λόγου καὶ μὴ μετὰ βίας διαλύσασθαι τὰ πρὸς ἀλλήλους ἐν τοῖς νόμοις τοῖς ἡμετέροις τὰς κρίσεις ἐποιήσαντο περὶ αὐτῶν.

change from the Heroic kingship to an aristocratic form of government.<sup>1</sup> Much the same situation developed in Attica, as may be seen in Aristotle's reconstruction of early Athenian history. The oath,<sup>2</sup> sworn by the archons against accepting bribes, is the same as was sworn in the days of Acastus, the first regent or archon under the new régime which usurped the chief functions of the kingship. The annual proclamation<sup>3</sup> of the archon assuring security of property to the citizens is at least as early as 683-682, the year in which the annual archonship was established.<sup>4</sup> But there is no reason why it may not be as old as the oath. The nobles who at first restricted, and then abolished, royalty naturally desired popular support. The promise of honest government and security of property was well calculated to conciliate and reassure the people who might have some misgivings regarding the new government. Security of property is one of the foundation stones of organized society. But no government would bind itself to respect the person or property of a citizen who tried to subvert it. The proclamation of the archon must have meant that no citizen would be deprived of his property without cause. The modern formula would be "without due process of law." And it is not too much to assume that in view of such a proclamation a government would not fail to bring before the sovereign body in the state any citizen suspected of designs to overthrow it. In effect this would amount to the institution of some sort of public trial

<sup>1</sup> Cf. *supra*, pp. 44 ff.

<sup>2</sup> Aristotle *Ath. Pol.* iii. 3: τεκμήριον δ' ἐπιφέρουσιν ὅτι οἱ ἐννέα ἀρχοντες ὁμνίουσιν ὥσπερ ἐπὶ Ἀκάστου τὰ δροκία ποιήσκειν, ὡς ἐπὶ τούτου τῆς βασιλείας παραχωρησάντων τῶν Κοδριδῶν ἀντὶ τῶν δοθεισῶν τῷ ἀρχοντι δωρεῶν.

*Op. cit.*, vii. 1: οἱ δ' ἐννέα ἀρχοντες ὁμνύντες πρὸς τῷ λίθῳ κατεφάτιζον ἀναθήσειν ἀνδριάντα χρυσοῦν, ἐάν τινα παραβῶσι τῶν νόμων. ὅθεν ἔτι καὶ νῦν οὕτως ὁμνίουσι.

*Op. cit.*, lv. 5: ἀναβάντες δ' ἐπὶ τούτον ὁμνίουσιν δικαίως ἄρξειν καὶ κατὰ τοὺς νόμους, καὶ δῶρα μὴ λήψεσθαι τῆς ἀρχῆς ἕνεκα, κἂν τι λάβωσι ἀνδριάντα ἀναθήσειν χρυσοῦν.

<sup>3</sup> *Op. cit.*, lvi. 2: Καὶ ὁ μὲν ἀρχων εἰθὺς εἰσελθὼν πρῶτον μὲν κηρύττει, ὅσα τις εἶχεν πρὶν αὐτὸν εἰσελθεῖν εἰς τὴν ἀρχήν, ταῦτ' ἔχειν καὶ κρατεῖν μέχρι ἀρχῆς τέλους. Cf. Busolt-Swoboda, *op. cit.*, II, 787-88, for judicial functions of early archonship.

<sup>4</sup> Busolt, *op. cit.*, II, 135; Meyer, *Gesch. des Altertums*, II, sec. 228; Busolt-Swoboda, *op. cit.*, II, 786.

before the ancient aristocratic council—the Areopagus.<sup>1</sup> Similarly, security of property against one who, to quote Hesiod,<sup>2</sup> “might stir up quarrels and strife to secure the possessions of another” could only be assured by invoking the aid of the magistrates. Let us take a simple case, a quarrel about boundary stones.<sup>3</sup> The victim of his neighbor’s encroachment, upon the failure of amicable means of settling the dispute, must have had the privilege of appearing before the archon with a petition for protection of his property. The magistrate could not act on *ex parte* information. The alternative was to have both parties before him. The result would be a legal process (δίκη) and a verdict. If the verdict was not obeyed, recourse could again be had to the magistrate to implement the promise in his proclamation. These proceedings were all doubtless more or less informal in an age when the administrative and judicial functions of magistrates were not differentiated and neither the substantive laws nor the rules of procedure had been reduced to writing.

Another clear indication of the antiquity of the Athenian legal process is afforded by the designation of the court fees as *πρυτανεία*. Lipsius believes that there is indicated a connection with an early court in the Prytaneum that cannot now be identified.<sup>4</sup> But it is possible to be more specific than Lipsius was willing to be.

The homicide court in the Prytaneum, consisting of the king archon and the tribe kings (φυλοβασιλείς), was in the historical period a purely ceremonial tribunal. It was in operation as early at least as the time of Draco, who provided in his homicide laws for the trial of animals or inanimate things that caused the death of a human being.<sup>5</sup> But, as

<sup>1</sup> Cf. *infra*, p. 169.

<sup>2</sup> *Works and Days*, 33 f.

<sup>3</sup> *Il.* xii. 421 ff.

<sup>4</sup> Lipsius, *Das Attische Recht*, p. 25; Keil, *Die Solonische Verfassung*, pp. 108 ff., identifies it with the court in the Prytaneum, mentioned in the amnesty law of Solon, which he thinks judged those accused of tyranny. But he is in error. The court mentioned in the amnesty law dealt with unknown murderers only. Tyrants were tried by the Areopagus. Cf. *infra* pp. 104 ff.

<sup>5</sup> Pausanias (vi. 11. 6), in describing the action of the Thasians against a statue that fell on a man and killed him, says they followed Draco, who provided in his homicide laws that if an inanimate object caused the death of a human being it



Draco was doubtless including in his legislation an ancient practice, it is reasonable to assume that the court is of great antiquity. But it is not to be supposed that the court was originally formed for a purely ceremonial purpose. It is obviously a relic of a very early court with wider jurisdiction and greater powers. It may go back to the institution of the Ionic tribes. The heads of the tribes (*φυλοβασιλείς*) must have outranked the Homeric Council of Elders attached to the suzerain king in Athens. It is quite unlikely that their co-operation with the king in the Council of Elders was confined to such religious and ceremonial functions as those of the court in the Prytaneum. It is more reasonable to suppose that they shared in a much wider range of judicial functions. The Prytaneum was always the seat of the highest officials in Athens.<sup>1</sup> When compulsory process of law was substituted for arbitration and the government undertook to provide machinery for the administration of justice, it is only natural that the king and the phylobasileis sitting in the Prytaneum should participate. The fees for the services thus rendered were euphemistically called "gifts" (*δῶρα*). They belong to the *γέρα* given to the Homeric kings both by the community and by individuals.<sup>2</sup> Whether all such offerings were designated as *τὰ πρυτανεῖα* (i.e., things belonging

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should be cast beyond the borders. Cf. Treston, *Poine*, pp. 91, 197 ff., 246 ff. Cf. Busolt-Swoboda, *op. cit.*, II, 792, for the early history of the phylobasileis: "Dieses Gericht (Prytaneum) war zweifellos eine Überrest einer einst ausgedehntern richterlichen Tätigkeit."

<sup>1</sup> Aristotle *Ath. Pol.* iii. 5; Thucydides ii. 15.

<sup>2</sup> Schöll, *Hermes*, VI, 23, developed a suggestion originally made by Boeckh in the 1817 edition of his *Staatshaushaltung der Athener*, I, 216, and repeated in the third edition by Fraenkel (I, 216): "Schon der Name der Prytaneien als Gerichtsgelder beweiset, dass diese ehemals den Prytanen als Richtern im Prytaneion wie ein Richtersold erlegt wurden, woraus ihre Mahlzeiten theilweise mochten bestritten worden." The identification of these judges in the prytaneum as the prytaneis of the Naucrars cannot be accepted.

So Meyer (*op. cit.*, sec. 225, A,) remarks, "Aus den Geschenken an den König sind später die Gerichtsgebühren erwachsen, so in Athen die *πρυτανεῖα* die von den Kolakreten, den Finanzbeamten des ältesten Staats, verwaltet werden." For the original functions of the Kolakretae, see *ibid.*, sec. 209. For their subsequent history, see Boeckh, *op. cit.*, I, 216. Cf. Busolt-Swoboda, *op. cit.*, II, 788, n. 1, on the implications of *πρυτανεῖα*.

to the Prytaneum) is not known. Possibly the term came to be applied to court fees exclusively because these were the most common, if not the only, "gifts" presented by individuals to the royal judges in the Prytaneum. Originally, the offerings were in kind, chiefly foodstuff. The kolakretae were the officials who took charge of them and prepared the public meals for the officials and the guests of the state. It is significant in this connection to recall that in the fifth century the kolakretae paid the Athenian dicasts out of a fund provided in part from the court fees (*τὰ πρυτανεία*).<sup>1</sup> The motives of the state in interfering in homicide cases can be more conveniently treated at a later stage in connection with a full discussion of the homicide courts.<sup>2</sup> But it is evident that the functions of the king archon and the phylobasileis in the Prytaneum in Aristotle's time point to a more vital participation on the part of these officials in the earliest steps taken by organized society to mitigate blood-feuds that tended to disrupt it, or to obviate the dangers of pollution. When a member of a phratry was slain, it was only natural that in some cases the immediate relatives should desire the advice or aid of their phratry.<sup>3</sup> Evidence in support of the view that members of a phratry actively participated in questions arising out of the murder of one of its members is found in the homicide laws of Draco. It was provided that where a murderer in exile was eligible for pardon (*αἵδεσις*) at the hands of the relatives of his victim, the members of the phratry might grant the pardon if there were no surviving relatives. Similarly, phratry members were permitted to join in the prosecution of a murderer.<sup>4</sup> It has been suggested that where murders involved persons of different tribes, intervention on the part of the phylobasileis may have occurred.<sup>5</sup> Naturally the king would act as chairman of such a commis-

<sup>1</sup> Aristophanes *Wasps*, 695, with Starkie's note.

<sup>2</sup> Cf. *infra*, p. 103.

<sup>3</sup> Cf. De Sanctis, *op. cit.*, pp. 49 f.

<sup>4</sup> Cf. *CIA* i. 61. 21 ff.: *συνδίδκεν δὲ καὶ ἀνεψιὸς καὶ ἀνεψιῶν παῖδας καὶ γαμβροὺς καὶ πενθεροὺς καὶ φράτερας*.

<sup>5</sup> Cary in *CAH*, III, 584; cf. Treston, *op. cit.*, p. 91.

sion. These considerations point strongly to a time when the king and the phylobasileis presided over the earliest homicide trials in the Areopagus.

Plutarch, in his account of the unification of Attica, touches upon the provisions made for the administration of justice. The nobles became administrators of justice (*διδασκαλοι τῶν νόμων*), while the king was intrusted with the guardianship of the laws in the interest of the common people.<sup>1</sup> These provisions are suspiciously like the later Athenian system projected back into early times. Provision was always made for the guardianship of the laws, whether by Areopagus or nomophylakes or nomothetae. Before the age of written codes, supervision over laws could most easily be exercised by hearing informal complaints against the decisions of the eupatrid judges. But an aristocratic kingship could not afford to run the risk of alienating the nobles by reversing their judgments in the interest of the masses.

The concentration of political power in Athens as the capital and the increase in the numbers of the city populace must have eventually hastened the development of some sort of legal process. If the conclusions drawn from the archon's annual proclamation and the suggested antecedents of the court of the Prytaneum are correct, the traditional claim that the Athenian legal process was an early development seems entirely warranted. It is at least as early as the establishment of the annual archonship (683-682 B.C.) and may very well go back to the earlier struggles between the king and the aristocracy in the establishment of a government in which the powers of the kingship were exercised by the archons.<sup>2</sup>

<sup>1</sup> Plutarch *Theseus*, xxiv and xxv.

<sup>2</sup> "Mit der Einsetzung des Archons unter Akastos ist dessen Stelle in der Liste der lebenslänglichen Erbkönige (bezw. Archonten) ganz unvereinbar. Da Akastos als zweiter in der Reihe der dreizehn lebenslänglichen und erblichen Eponymo erscheint, so müßte er etwa um die Mitte des 11. Jahrhunderts gelebt haben. Aber der relativ junge Charakter des Archontenamtes und die noch um die Mitte des 7. Jahrhunderts aktuelle Bedeutung der Eidopfer unter Akastos verbieten es, das Amt über die Mitte des 8. Jahrhunderts hinauszurücken."—Busolt-Swoboda, *oj cit.*, II, 789.

## CHAPTER III

### THE LAWGIVERS

Under the rule of the early aristocracy in Greece, the magistrates administered an unwritten customary law. The common people, dissatisfied by reason of the uncertainties of the interpretation and administration of the law, demanded the substitution of a set of rules binding upon all judges, in place of the body of vague customary laws which could be modified and interpreted to suit the interest of the ruling class—the bribe-devouring kings of Hesiod.<sup>1</sup> Whether in every case concessions were extorted by the people, or whether they were the result of an act of grace on the part of the aristocracy to forestall the danger which they saw was coming, is uncertain and immaterial. At any rate, there was general codification of the laws in Greece in the course of the seventh century.<sup>2</sup> Contemporary opinion about the necessity for codified laws and the resultant advantages and disadvantages is voiced on the one hand by Hesiod, a member of the lower classes, who had suffered from the maladministration of justice, and on the other hand by Alcaeus and Theognis, nobles who had lost their privileges through the new state of affairs. Theognis makes strikingly clear the attitude of the nobles toward the new powers and privileges of the common people. There is no hope for the city in which the power has been transferred from the nobles (*οἱ ἀγαθοί*) to the commons (*οἱ κακοί*) :

Our commonwealth preserves its former frame  
Our common people are no more the same.  
They, that in skins and hides were rudely dress'd,

<sup>1</sup> *Works and Days*, 38 f.

<sup>2</sup> The codification of law in Greece is so important a step in the evolution of the judiciary and judicial practice and procedure that it has been thought best for the proper appreciation of the work of Draco to discuss in some detail the work of the lawgivers that appeared relatively about his time elsewhere in Greece. For the contributions of the lawgivers toward the development of criminal law, cf. Calhoun, *Criminal Law*, pp. 107 ff.

Nor dreamt of law nor sought to be redress'd  
 By rules of right, but in the days of old  
 Flock'd to the town like cattle to the fold,  
 Are now the brave and wise. And we, the rest  
 (Their betters nominally, once the best),  
 Degenerate, debased, timid, and mean!  
 Who can endure to witness such a scene?  
 Their easy courtesies, the ready smile,  
 Prompt to deride, to flatter and beguile!  
 Their utter disregard of right or wrong,  
 Of truth or honor!"

Theognis had a personal cause for grievance in the confiscation of his property.<sup>2</sup> Fifth-century opinion is represented by the following statement of Euripides:

No worse foe than the despot hath a state,  
 Under whom, first, can be no common laws,  
 But one rules, keeping in his private hands  
 The law: so is equality no more.  
 But when the laws are written, then the weak  
 And wealthy have alike but equal right.  
 Yea, even the weaker may fling back the scoff  
 Against the prosperous, if he be reviled;  
 And, armed with right, the less o'ercomes the great.<sup>3</sup>

Among modern writers, who deal with the matter merely from a historical point of view, Maine sees in the codes a means of protection against the degeneration and corruption of customary usages. Pollock, on the other hand, declares that codification may sometimes arrest the normal development of law, and cites as an example the Roman Twelve Tables, which, he says, "went near to stereotype an archaic and formalist procedure."<sup>4</sup>

<sup>1</sup> 53 ff. (Frere's translation). Cf. Alcaeus, *Frag.* 59 (Hiller-Crusius).

<sup>2</sup> Cf. 1197 ff.:

Ὅρνιθος φωνήν, Πολυπαῖδῃ, δέξω βοῶσσης  
 ἤκουσ', ἦτε βροτοῖς ἀγγελος ἦλθ' ἀρότου  
 ὦραλον· καί μοι κραδίην ἐπάταξε μέλαιναν,  
 ὅττι μοι εὐανθεῖς ἄλλοι ἔχουσιν ἀγροῦς  
 οὐδέ μοι ἡμίονοι κύφων' ἔλκουσιν ἀρότρου  
 τῆς (μάλα μισητῆς) εἵνεκα ναυτιλίας.

<sup>3</sup> *Supplices*, 429 ff. (Way's translation).

<sup>4</sup> Maine, *Ancient Law*, with notes by Pollock, pp. 16 and 25.

It is not a matter of accident that the codification began in the colonies rather than on the mainland of Greece. It is only natural that the colonists, freed from the restraints of conservatism at home, should be more progressive and more inclined to embark upon social and political reforms. Moreover, the different physical conditions in the colonies necessitated considerable adaptation of, and addition to, the laws of the homeland. In modern times the tendency on the part of self-governing colonies to make political and social innovations is well illustrated in the case of Australia and New Zealand, which have worked out important experiments in democracy.<sup>1</sup> In the Greek colonies, codification was sometimes rendered imperative because the colonists were recruited from different cities with divergent systems of customary law.<sup>2</sup> Hence, no single set of customary laws could be entirely satisfactory to all the citizens.

It is interesting to note that the first codes were made in the western colonies, which were farther from Greece than the eastern colonies both in distance and in the difficulty of the voyage. The western colonies were settled by Ionians, Dorians, and Achaeans. Each of these races produced its own lawgiver: Zaleucus in Achaean Locris,<sup>3</sup> Charondas in Ionian Catana, and Diocles in Dorian Syracuse.<sup>4</sup> The adop-

<sup>1</sup> Cf. Bryce, *Modern Democracies*, II, 166 and 329.

<sup>2</sup> Sometimes the lawgiver was intrusted also with the framing of a constitution. Cf. *infra*, p. 134.

<sup>3</sup> Aristotle (*Pol.* 1274a. 25) refers to Onomacritus the Locrian, who was wrongly regarded by some (probably the reference is to Ephorus; cf. Newman, *The Politics of Aristotle*, II, 377) as the first person of note to draw up laws. He may be identical with the Athenian oracle-monger of the age of Peisistratus. Cf. Newman, *op. cit.*, II, 379.

<sup>4</sup> Diodorus xii. 19; xiii. 35. Cf. Meyer, *Geschichte des Altertums*, II, 566 ff., for data on the lives of the various lawgivers. Cf. also articles "Charondas," "Diokles," "Lykurgos," "Drakon," in Pauly-Wissowa; Busolt-Swoboda, *Staatskunde*, pp. 369 ff. For Zaleucus and Charondas, cf. Mühl, "Die Gesetze des Zaleukos und Charondas," *Klio*, XXII, pp. 105 ff., 432 ff.; Adcock, "Literary Tradition and Early Greek Codemakers," *Cambridge Historical Journal*, II, No. 2, 95 ff. The laws of Zaleucus and Charondas were generally regarded as the oldest written laws in Greece. They must have been written before the middle of the seventh century. To the seventh century belong also Androdamos, Philolaus, Pheidon, Draco (traditional date 621 B.C.). Pittacus and Solon belong to the early years of the sixth

tion of the laws of Charondas by the Ionian (Chalcidian) cities of Italy and Sicily is specifically mentioned by Aristotle.<sup>1</sup> These cities included Naxos, Zancle, Mylae, Himera, in Sicily; Rhegium, and possibly also Cyme, in Italy. Zaleucus' laws were adopted also in Sybaris, and those of Diocles in other Sicilian cities. The fact that the Ionian colonies adopted the laws of Charondas suggests the possibility that the laws of Zaleucus were to be found in the other Achaean colonies of the west, and those of Diocles in the Dorian colonies. The mixed colony of Thurii (founded 443 B.C.) is said by Diodorus to have adopted the laws of Charondas. Other authorities say that the colony adopted the laws of Zaleucus. Since the laws of Zaleucus were in use in the neighboring colony of Sybaris, it seems more likely that his code would be the one adopted in Thurii.<sup>2</sup>

Some of the western codes found their way into eastern Hellas. The code of Charondas was introduced even into the island of Cos<sup>3</sup> and in Mazaka, a city of Cappadocia.<sup>4</sup> The Chalcidians of Thrace (Euboean Chalcidians) are said to have summoned Androdamas from Chalcidian Rhegium to formulate laws for them. It is quite possible that he introduced the code of Charondas, which was in force in his native city, although his name is connected with homicide laws which are not mentioned in the code of Charondas.<sup>5</sup> Other cities in Asia Minor and the islands produced their own lawgivers. Pittacus of Mytilene established a code of laws for his native city;<sup>6</sup> and there is a bare reference to Aristides, the lawgiver of Ceos.<sup>7</sup> The code about which the

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century. For the dispute about the date of Diocles, cf. Freeman, *History of Sicily*, III, 722 ff. Later Syracusan lawgivers are said by Diodorus to have been regarded merely as interpreters of Diocles' laws because of the ancient dialect in which they were written.

<sup>1</sup> *Pol.* 1274a. 23 ff.; cf. Heracl. Pont. *de reb. pub.* 25. 4.

<sup>2</sup> Diodorus xii. 11; Athenaeus xi. 508a.; Suidas s.v. Ζάλευκος. For a detailed discussion of the question, cf. Busolt, *Geschichte*, III, 534, n. 1.

<sup>3</sup> Herondas 2. 46 ff.

<sup>4</sup> Strabo xii. 2. 9.

<sup>5</sup> Aristotle *Pol.* 1274b. 23 ff.

<sup>6</sup> *Ibid.*, 1274b. 18; cf. Plutarch *Sept. Sap. Conv.*, 13; Alcaeus, frag. 42.

<sup>7</sup> Heracl. Pont., 9.

most is known belongs to the city of Gortyn on the island of Crete.<sup>1</sup> The name of the lawgiver—if the large fragment is the work of an individual—is unknown.

Various cities in the homeland had their own lawgivers. The institutions of Sparta were attributed to Lycurgus. But Spartan laws were not reduced to writing.<sup>2</sup> Athens is commonly supposed to have received her first code of laws at the hands of Draco.<sup>3</sup> Philolaus of Corinth made laws for the Thebans,<sup>4</sup> while the Corinthians themselves were provided with laws by Pheidon.<sup>5</sup> The exact situation in Megara is not known; but from the statements of Theognis,<sup>6</sup> it is evident that a democracy must have prevailed there for a time,

<sup>1</sup> Collitz-Bechtel, *SGDI*, 4991; Comparetti, *Monumenti Antichi*, III, 93 ff.; Dareste, Haussoullier, Reinach, *Recueil des inscriptions juridiques grecques*, I, 352 ff.; Michel, *Recueil d'inscriptions grecques*, 1333; Solmsen, *Inscriptiones Graecae ad illustrandos dialectos selectae*, 30; Kohler and Ziebarth, *Das Stadtrecht von Gortyn*; Buck, *Greek Dialects*, pp. 261 ff.; Gertrude Smith, *The Administration of Justice from Hesiod to Solon*, pp. 32 ff.

The code of Gortyn belongs mainly to the fifth century. But there are fragments of it which go back to the seventh century. Furthermore, Crete, like Sparta, is a type of arrested development. The social and political organization of the cities abounded in archaic survivals even in the age of Ephorus and Aristotle. The code seems to be a restatement, with additions and amendments, of articles and chapters of a prior code. So, in point of development, there is justification for comparing it with the legal system of Athens in the seventh and sixth centuries. It is noteworthy that there is no mention of homicide. It may be suggested that another portion of the code, not now extant, dealt with this subject. Or, possibly, self-help in homicide was still practiced and the state had not yet assumed control. For the mention of blood-money in fragments of the earlier codes, cf. *infra*, p. 79. Cf. Wyse, in Whibley, *Companion to Greek Studies*, p. 379.

<sup>2</sup> For the various theories about Lycurgus, cf. Ehrenberg, *Neugründer des Staates*, pp. 7 ff.

<sup>3</sup> Ancient writers ascribed to Athens the invention of lawsuits (Aelian *V. H.* iii. 38; cf. Lipsius, *Das Attische Recht*, p. 1, and *supra*, p. 61). This does not mean, however, that they were the first Greeks to have a written law. According to Strabo (vi. 1. 8), the western Locrians were the first Greeks to establish written laws. Cf. Scymnus of Chios, 312 ff.

<sup>4</sup> Aristotle *Pol.* 1274b. 2.

<sup>5</sup> *Ibid.*, 1265b. 12 ff.

<sup>6</sup> 289 ff.

Νῦν δὲ τὰ τῶν ἀγαθῶν κακὰ γίνεται ἐσθλὰ κακοῖσιν  
ἀνδρῶν ἡγέονται δ' ἐκτραπέλοισι νόμοις  
αἰδῶς μὲν γὰρ ὄλωλεν ἀναιδείη δὲ καὶ ὕβρις  
νικήσασα δίκην γῆν κατὰ πᾶσαν ἔχει.

Cf. 53 ff., quoted *supra*, p. 67.



during which the people acquired a written code of laws from some unknown lawgiver.

There are examples of lawgivers from all classes of society, but the majority were drawn from the middle class. The nobility naturally were opposed to codification, inasmuch as it deprived them of many privileges. Aristotle declares that the best lawgivers belonged to the middle class. In proof of this statement he offers, as examples, Solon, Lycurgus, and Charondas.<sup>1</sup> The accounts of Zaleucus' rank are contradictory. According to one story, the laws were given to him in a dream by Athena while he was a poor shepherd.<sup>2</sup> But in the account given by Diodorus, he is described as *ἄνθρωπος εὐγενὴς καὶ κατὰ παιδείαν τεθραυσμένος*.<sup>3</sup> Pittacus was not himself of noble family, but he married a daughter of the tyrant Penthilus.

In some cases the task of establishing a code of laws was intrusted to one of the citizens, specially chosen. Occasionally he was vested also with some high office. So at Athens, Draco was a special thesmothete in 621 B.C., the year to which his legislation is generally assigned. Solon, chosen as *διαλλακτήης* to revise the laws and constitution, was appointed archon.<sup>4</sup> Pittacus is an illustration of an extraordinary magistrate intrusted with the making of laws. He was appointed supreme ruler of the city (*ἄριστον*) for a period of ten years in order to restore civil peace. In general, with regard to the other lawgivers, there is no information about the circumstances under which they were appointed or about the official positions which they held. It is hardly to be supposed that a foreigner called in to establish a code of laws would be clothed with any political authority.<sup>5</sup>

The earliest laws were generally believed to be of divine

<sup>1</sup> *Pol.* 1296a. 18 ff.; cf. *Ath. Pol.*, v; Plutarch *Solon*, i, xiv, and xvi; *Lycurgus*, iii; *Cleom.*, x.

<sup>2</sup> Scholiast, Pindar *Olymp.* 10. 17.

<sup>3</sup> xii. 20.

<sup>4</sup> Cf. F. D. Smith, *Athenian Political Commissions*, pp. 13 f., who sees in these two lawgivers the beginning of the commission principle.

<sup>5</sup> Cf. Androdamas, who came from Rhegium to make laws for the Chalcidians in Thrace.

origin.<sup>1</sup> For example, Zeus was responsible for the Cretan laws, since Minos and Rhadamanthus received their inspiration directly from him.<sup>2</sup> The laws of the western Locrians were said to have been communicated to Zaleucus by Athena in a dream,<sup>3</sup> after he had been appointed to frame a code of laws in answer to the response of the Delphic oracle.

There are many tales of the visits of lawgivers to foreign countries for the purpose of studying the institutions of other cities, both customary and recorded. For instance, Zaleucus is reported by Ephorus to have taken his laws from Cretan, Spartan, and Athenian sources.<sup>4</sup> According to Plutarch,<sup>5</sup> Lycurgus studied the institutions of Crete, Ionia, Egyptian cities, and perhaps of Libya, Iberia, and India. Herodotus states that the Spartan institutions came from Crete.<sup>6</sup> Before drawing up his code, Charondas examined the laws of many peoples and chose from them the best.<sup>7</sup>

<sup>1</sup> There appears always to have been a feeling that there was some inspired person responsible for the laws. Cf. the famous personification of the laws in *Crito*, 50a ff.

<sup>2</sup> Plato *Laws*, 624. Beloch (*Griechische Geschichte*, I, 1, 350) believes that these early codes were really all attributed to gods—even that of Draco. So the Cretans referred their laws to Minos; and, as he was reduced from a god to a hero, they said that the laws were given to him by Zeus. The Lacedaemonians considered their laws a revelation of the god of light. Tyrtaeus believed that they came from Delphi. This is due to the story which grew up after Lycurgus had been reduced to a hero that he received the sanction for his laws from the Delphic oracle. In the same way Zaleucus is the "Hellstrahlende" and Charondas the "Helläugige"—both sun-gods. Diocles of Syracuse was a god, since he had a temple in Syracuse and was worshiped as a hero at Thebes. Philolaus is also a figure of mythology. The most ancient laws of Athens were attributed to Draco, the serpent god, who was worshiped under the names of Erechtheus and Cecrops on the Acropolis and who was regarded as the founder of the state. Cf. Mühl, *op. cit.*, pp. 107 f., for a criticism of Beloch.

<sup>3</sup> Scholiast, Pindar *Olymp.* 10. 17. Cf. Plutarch, *De se ips. laud.*, 11.

<sup>4</sup> Strabo, vi. 1.8. Meyer believes that in this statement Ephorus was wrong. Gilbert (*Beiträge*, pp. 478 f.), on the other hand, argues that Ephorus' statement is sound, inasmuch as identical provisions are found in Cretan and in Locrian law and also in Athenian and Locrian law. But according to this method of reasoning, all of the early codes could be assumed to be related, for similar provisions occur in many of them.

<sup>5</sup> *Lycurgus*, iv.

<sup>6</sup> i. 65 ff.

<sup>7</sup> With these tales may be compared the alleged embassy of the Romans to Athens at the time of the decemviral legislation. In modern times it was long the

The early codes were doubtless based on traditional and customary law.<sup>1</sup> In procedure this dependence on customary law would be most marked. In the case of homicide, there would be a tendency to adhere to the existing practice, inasmuch as the procedure was ritualistic. Religious conservatism would tend to prevent innovations. It is quite obvious that Draco followed the practice of the time in his homicide laws.<sup>2</sup> It may well be, also, that the procedure used at Cyme in homicide trials, that is, the evidentiary oath with oath helpers,<sup>3</sup> represents customary practice which was seized upon by the legislator and introduced into the code. It is quite probable that the tendency, observable in homicide cases, to make use of a procedure which was already familiar, spread to other types of cases also. No specific instances of the perpetuation of customary law can be recognized as such. On the other hand, there are indications that early legislation was more than a mere record of customary law. The fact that in general the lawgivers were regarded as inspired would seem to indicate that their laws were to some extent different from the customary law. New conditions, both political and social, had to be met by many new provisions. Thus Charondas is said to have invented many new regulations.<sup>4</sup>

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prevailing view that such an embassy never occurred. On the other hand, Cicero mentions one law of Solon which was adopted by the decemvirs (*De leg.* 2. 25. 64: "Quam legem (Solonis) eisdem prope verbis nostri decemviri in decimam tabulam coniecerunt." Cf. 2. 23. 59). Other ancient writers accept the story of the embassy, e.g., Dionys. Hal. *Antiq. Rom.* x. 51 ff.; Livy iii. 31. Hofman, *Beitrage zur Geschichte des griechischen und römischen Rechts*, pp. 1 ff., argues convincingly in favor of Greek influence on the Twelve Tables, and his conclusions are accepted by Beauchet, *Histoire du droit privé des Athéniens*, I, xxiii. Cf. Jefferson Elmore, "The Purpose of the Decemviral Legislation," *Class. Philol.*, XVII, 138.

<sup>1</sup> In some cases there would be some written material available for the lawgiver. The work of the thesmothetae, for instance, may have afforded Draco some written material as a basis for his work. Their task consisted partly in recording judicial decisions. Cf. *infra*, p. 85.

<sup>2</sup> Cf. *infra*, p. 111.

<sup>3</sup> Cf. *infra*, p. 79. Cf. Gertrude Smith, *Administration of Justice from Hesiod to Solon*, pp. 79 f.

<sup>4</sup> Diodorus xii. 11. According to Aristotle (*Pol.*, 1325a), it was the duty of a good legislator to examine his state and the nature of his people, and likewise their relations with neighbors, in order to satisfy their needs by his laws.

The reluctance of the Greeks to alter, or even to criticize, their laws is probably due in part to the general belief in their divine origin. At any rate, there are provisions in some of the codes which rendered it extremely difficult to change the laws. There was a requirement in Locris that if anyone wished to introduce a new law or to change an old one, he had to argue the matter with a rope about his neck before the Council of One Thousand. If the council voted against him, he was choked to death on the spot.<sup>1</sup> Only one law was so changed during a period of two hundred years.<sup>2</sup> Diodorus ascribes a similar provision to Charondas.<sup>3</sup> He says that only three laws were ever changed by this procedure at Thurii. The same reluctance to change laws is shown in Athens by the elaborate procedure provided in the fourth century for changes and amendments.<sup>4</sup> The advisability of changes in the laws was much debated by the theoretical lawgivers and political theorists. The Pythagoreans held that it was better to abide by the ancient laws.<sup>5</sup> One of the charges made by the opponent of tyranny in the famous political debate reported by Herodotus is that tyrants alter the ancestral laws.<sup>6</sup> So also Cleon, as well as other speakers in Thucydides, declares that it is better to keep the laws unchanged.<sup>7</sup> The fact that a law is ancient and unchanged is cited by the orators as a proof of its excellence.<sup>8</sup> The theoretical lawgivers do, however, advocate alteration under certain conditions. Aristotle objects to allowing the laws to remain for a long period of time without change. But where the advantage of the new law is trifling, it is much better to retain the old law without alteration. Frequent changes in the laws tend to produce contempt for law and result in disobedience.<sup>9</sup>

<sup>1</sup> Demosthenes xxiv. 139; Polybius xii. 16; Stobaeus *Flor.* 44. 21.

<sup>2</sup> Demosthenes xxiv. 139 ff.

<sup>3</sup> xii. 17.

<sup>4</sup> For the process involved, cf. Gilbert, *Constitutional Antiquities*, pp. 301 ff.

<sup>5</sup> Aristox. *Frag.* 19; Müller, *Fr. Hist. Gr.*, II, 278.

<sup>6</sup> iii. 80.

<sup>7</sup> iii. 37. 3; i. 71. 3.

<sup>8</sup> Antiphon v. 14; vi. 2.

<sup>9</sup> *Pol.*, 1268b ff. Cf. Plato, *Laws*, 634; *Polit.*, 295e ff.

The work of the lawgiver was made possible by the discovery and diffusion of the art of writing.<sup>1</sup> The laws were regularly recorded on the walls of some public building or on separate *stelae* set up in a public place. The extant fragment of the laws of Draco belongs to the fifth century, but in early times the laws of Draco, like those of Solon, were published on pillars of wood or bronze called *κύρβεις* or *ἄξονες*. According to later Greek writers, the *κύρβεις* were three-cornered, the *ἄξονες* four-cornered. The former contained religious laws, while the latter contained civil law.<sup>2</sup> But it may be seen from earlier writers that the two were identical and that the names were used interchangeably, *κύρβεις* referring to their shape and *ἄξονες* to the fact that they could be turned around.<sup>3</sup> Weiss believes that the laws in the stoa were on stone while the wooden originals were kept in the Prytaneum.<sup>4</sup> Other old laws were inscribed on the inside walls of the stoa. The laws of the Areopagus were set up so that the court had them before their eyes when trying a case. The laws of Gortyn are known from the original inscription. The fragments belonging to the earlier period were probably parts of the walls of the temple of Pythian Apollo, inasmuch as they were found on the site of that building. It is generally supposed that the laws of the second period were engraved on the inner wall of a sort of courthouse.<sup>5</sup> Aside from copies on wood and stone, there must also have been documentary copies. A reference to the singing of Charondas' laws<sup>6</sup> and another reference to the *νομοδός* in Mazaka, where Charondas' laws were introduced,<sup>7</sup> make it seem not improbable that there was provision in some cities for the regular repetition of the laws at intervals in order to familiarize the citizens

<sup>1</sup> Maine, *op. cit.*, pp. 12 f.

<sup>2</sup> *Etymologicum magnum* and Suidas under *κύρβεις*. Cf. Sondhaus, *De Solonis Legibus*, p. 4, with diagram.

<sup>3</sup> Aristotle *Ath. Pol.*, vii; Plutarch *Solon*, xxv.

<sup>4</sup> Egon Weiss, *Griechisches Privatrecht*, I, 34 ff. Cf. Gilbert, *op. cit.*, pp. 140 ff.

<sup>5</sup> Cf. Wyse, in Whibley, *Companion to Greek Studies*, p. 466.

<sup>6</sup> Athenaeus 14. 619b.

<sup>7</sup> Strabo xii. 2. 9.

with them.<sup>1</sup> The *νομοφδοί* appears also to have interpreted the laws, being somewhat similar in character to the *ἐξηγηταί* at Athens.

On the whole, the information gained from the codes about the actual administration of justice is rather slight. The extant fragments, however, indicate that judicial functions were assigned to the regular magistrates assisted by secretaries, and to special judicial officers. The sole traces of courts composed of a group of judges before the legislation of Solon are in the code of Charondas,<sup>2</sup> but nothing is known about their organization or jurisdiction. The popular assemblies in democracies and the senates in oligarchies apparently participated to some extent in the administration of criminal law. The Areopagus at Athens, for instance, acted in the twofold character of an administrative and a judicial body. The fact that the fragments of the Draconian and Gortynian codes are devoted almost entirely to procedure makes it seem probable that considerable emphasis was laid on it in the codes generally. Aristotle singles out for especial mention the so-called *ἐπίσκηψις* of Charondas in connection with actions for perjury which he was the first to institute.<sup>3</sup> According to Polybius, Zaleucus permitted self-help in case a slave had been carried off.<sup>4</sup>

A noteworthy feature, because novel at this time, is the fixing of penalties. No longer is the punishment left to the arbitrary will of the judge.<sup>5</sup> According to later standards, the punishments provided by these early lawgivers were exceedingly severe.<sup>6</sup> The severity of Draco's laws became proverbial. The orator Demades said they were written, not in ink, but in blood.<sup>7</sup> The severity of Charondas' punishments may be illustrated by the provision of the death pen-

<sup>1</sup> Freeman, *op. cit.*, II, 60, believes that the laws were often in verse that they might be more easily remembered.

<sup>2</sup> Aristotle *Pol.* 1297a. 21 ff.

<sup>3</sup> *Pol.* 1274b. 7.

<sup>4</sup> xii. 16. Calhoun, *op. cit.*, p. 117, believes that neither Zaleucus nor Charondas made any notable advance in criminal law.

<sup>5</sup> Strabo vi. 1. 8.

<sup>6</sup> Aristotle *Pol.* 1274b. 17.

<sup>7</sup> Plutarch *Solon*, xvii.

alty for entering the assembly wearing a sword. He himself broke the law and committed suicide.<sup>1</sup> The same story is told of Diocles of Syracuse, whose punishments also were notoriously harsh.<sup>2</sup> On the other hand, the punishments imposed by the Gortyn code were regularly fines. Charondas also provided fines for various offenses. He attempted to force the citizens to perform their civic duties by the imposition of fines for failure to act as jurors. He laid greater fines upon rich offenders in this regard than upon the poor.<sup>3</sup> One of the mimes of Herondas records a law of Charondas regarding assault on a slave girl by a freeman.<sup>4</sup> The penalty was double the amount of the injury. It is interesting to compare with this the fine of five drachmas imposed by the Gortyn code for a similar offense.<sup>5</sup> In the same mime of Herondas there is a list of fines for assault, house-breaking, and arson:

ἦν θύρην δέ τις κόψῃ,  
 μνῆν τινέτω, φησί· ἦν δὲ πύξ ἀλοιήσῃ,  
 ἄλλην πάλι μνῆν, ἦν δὲ τὰ οἰκί' ἐμπρήσῃ,  
 ἢ ὄρους ὑπερβῇ, χιλίας τὸ τίμημα  
 ἐνειμε, κῆν βλάβῃ τι, διπλῶν τίνειν.

This illustrates very well the minute provisions (ἀκρίβεια) of Charondas' laws upon which Aristotle comments;<sup>6</sup> for example, ἀλοιήσῃ is further defined by πύξ. Punishments were often vindictive. For example, the adulterer, according to the code of Zaleucus, was blinded.<sup>7</sup> In the laws of Charondas it was provided that a deserter should be placed in the agora for three days in women's clothes. A sycophant had to appear publicly with a crown of tamarisks.<sup>8</sup>

So far as can be determined from the scanty fragments, there is no attempt in the codes to classify laws according to their subject matter. Civil, criminal, religious laws, and

<sup>1</sup> Diodorus xii. 19.

<sup>2</sup> Diodorus xiii. 33 and 35.

<sup>3</sup> Aristotle *Pol.* 1297a. 15 ff. Cf. Mühl, *op. cit.*, p. 115. For graduated fines for failure to attend meetings of assembly and council, cf. *Ath. Pol.* iv. 3· xxx. 6. Attempts to enforce performance of civic duties have been made in some modern states. Cf. compulsory voting in Argentina (Bryce, *op. cit.*, I, 196).

<sup>4</sup> 2. 46 ff.

<sup>5</sup> 2. 9.

<sup>6</sup> *Pol.* 1274b. 7.

<sup>7</sup> Aelian *V. H.* xiii. 24.

<sup>8</sup> Diodorus xii. 12.

rules which have merely to do with the moral life of the citizens are thrown together indiscriminately.<sup>1</sup> Noteworthy is the absence of provisions regarding homicide in the fragments of the codes of the majority of the lawgivers. This omission may be due to accident. It is possible, however, that in many places homicide was dealt with entirely by relatives of the deceased and was not yet considered a matter for interference on the part of the state. The fact that such provisions do not appear in the most complete of the codes, the Gortynian, may be due to the loss of part of the code, inasmuch as mention is made of blood-money in the fragments of the earlier code. The only homicide laws of which any details are known are those of Draco, the Athenian lawgiver.<sup>2</sup>

Several of the lawgivers are known to have made provisions regarding marriage and divorce. So Androdamas legislated about heiresses, as did the Gortyn code. There was a law of Charondas that an heiress should claim her nearest male relative in marriage. If he failed to marry her, he was obliged to pay her 500 drachmas as a dowry. This law was later changed so that the relative was obliged to marry her. The law which permitted a woman to divorce her husband and to live with whomever she pleased was also changed.<sup>3</sup> There are various provisions in the Gortyn code dealing with the status and privileges of the divorced woman.<sup>4</sup>

<sup>1</sup> Demosthenes divides laws into two kinds: those which regulate our dealings with one another and those which regulate our dealings with the state (xxiv. 192). Cf. Hippodamus who, according to Aristotle (*Pol.* 1267b. 22), divided laws into three kinds, corresponding to three sets of actions: assault, trespass, or death. Maine (*op. cit.*, p. 13) explains the apparent attempt at classification in the Twelve Tables as due to Greek influence.

<sup>2</sup> No homicide laws are mentioned in the codes of any of the other lawgivers except Androdamas, who legislated for the Chalcidians in Thrace. Aristotle mentions an ancient law of Cyme providing for oath helpers in a homicide case. *Pol.* 1269a. Cyme in Italy is a Chalcidian city, and, according to Aristotle, all Chalcidian cities adopted the laws of Charondas. If, then, Aristotle is referring to Italian Cyme and not Cyme in Asia Minor, also a Chalcidian colony, it is tempting to suggest that this law is a part of the code of Charondas either in its original form or as it was modified to suit the conditions in Cyme. If that be true, Androdamas' homicide laws probably have the same origin.

<sup>3</sup> Diodorus xii. 18.

<sup>4</sup> 2. 45 ff.; 3. 44 ff.; 8. 20 ff.; 11. 46 ff.



A great effort was made to protect the interests of children. The parents were still permitted to expose children, but the rights of those who were allowed to live were scrupulously guarded. Charondas is supposed to have attached great importance to the family as the basis of the life of the state.<sup>1</sup> A widower who brought a stepmother into his house was forbidden to take part in the councils of state.<sup>2</sup> The property of orphans was cared for by the father's people, while the orphans themselves were brought up by the mother's relatives. The father's relatives presumably would administer the estate carefully on the chance that it would come to them if anything befell the orphans. The cost of the education of the sons of all citizens was borne by the state according to Charondas' regulations.<sup>3</sup> In the Gortyn code, the uncles on both sides managed the property of an heiress.<sup>4</sup>

There were various laws regarding the limitation of the number of the citizens. Pheidon, the Corinthian, fixed the number of families and of the citizens.<sup>5</sup> The νόμοι θετικοί of Philolaus at Thebes were passed as a means of keeping the number of families unchanged.<sup>6</sup> Lycurgus fixed the number of households and of lots, but apparently did not limit the number of citizens, for there was a law at Sparta encouraging the growth of the population.<sup>7</sup>

The increasing importance of slavery made provisions regarding slaves necessary. Slavery would naturally be a problem of great importance in the colonies where a conquered people was reduced to servitude. With the introduction of manufactures, the mother-cities were forced to resort to the importation of slaves in large numbers since there were no longer sufficient free laborers available.<sup>8</sup> Few specific pro-

<sup>1</sup> Aristotle *Pol.* 1252b. 14.

<sup>2</sup> Diodorus xii. 12. 1.

<sup>4</sup> Gortyn code 12. 28 ff.

<sup>3</sup> *Ibid.*, xii. 12. 4.

<sup>5</sup> Aristotle, *Pol.* 1265b. 12 ff.

<sup>6</sup> Cf. Newman, *op. cit.*, II, 381. He agrees with Hermann (*Gr. Ant.*, III, sec. 65, 2) that, by permitting adoption, Philolaus in effect introduced testation in Thebes.

<sup>7</sup> Plutarch *Agis* v. 1; Aristotle *Pol.*, 1270b; Plato *Laws*, 740d.

<sup>8</sup> Cf. Bury, *History of Greece*, p. 118.

visions about slaves are known. Zaleucus permitted self-help in the recovery of a stolen slave,<sup>1</sup> and Charondas fixed the penalty, as did the Gortyn code, for the rape of a slave girl.<sup>2</sup> This seems to indicate that the slave was coming to be recognized as such a valuable asset that certain provisions were passed to protect him. There was also constant danger that a freeman might be kidnapped and sold as a slave, and certain provisions were included in the codes in regard to this matter. Slavery for debt is freely recognized in the codes, but a man sold into slavery for debt was readmitted to all the rights and privileges of a free citizen on the payment of the debt. The ransomed man who failed to pay back the price of his ransom was reduced to slavery.<sup>3</sup> In Athens the evil of slavery for debt was finally abolished by Solon.<sup>4</sup>

There were a few laws regulating the transfer and disposition of property. In the earliest period there was a marked tendency to keep property in the hands of the landed classes. Thus a Locrian<sup>5</sup> law forbade the sale of private property (*οὐσία*) unless the owner was able to prove that he had suffered misfortunes great enough to necessitate it. At Athens before the time of Solon it was impossible to alienate property from relatives by will. All provisions about heiresses and adoption were intended to prevent property from going out of the family. Solon's permission to alienate property by will shows the reaction which took place in the course of time against this state of affairs. He also limited the amount of land which a citizen might possess.<sup>6</sup> There are many provisions in the Gortyn code limiting the size of gifts which could be made.<sup>7</sup>

The new demands of the times made necessary some regulations for suits arising out of business relations. Some such

<sup>1</sup> Polybius xii. 16.

<sup>2</sup> Herondas 2. 46 ff.

<sup>3</sup> Gortyn code 6. 46 ff.

<sup>4</sup> Cf. Grote, *History of Greece*, III, 94 ff.

<sup>5</sup> Aristotle *Pol.* 1266b. 19; cf. Büchsenschütz, *Besitz und Erwerb*, p. 32, n.

<sup>6</sup> Cf. Aristotle *ibid.* It is not until later, in the provisions suggested by the theoretical lawgivers, that equality of property is emphasized. Cf. *ibid.*, 1266a. 39 ff.

<sup>7</sup> 10. 15 ff.

provisions are credited to Zaleucus.<sup>1</sup> The code of Charondas discouraged the granting of credit by not allowing a man to institute proceedings against another whom he had trusted and who had failed to make payment.<sup>2</sup> A law of Pittacus provided that a contract was not binding unless executed before the magistrates as witnesses.<sup>3</sup>

The sumptuary legislation of the early lawgivers was passed partly in a democratic spirit to prevent display by wealthy families and partly to improve the morals of the citizens. An old Achaean inscription<sup>4</sup> gives explicit directions about the apparel of a corpse and the display permitted at the burial. There are also various provisions about excess in drinking and association with evil companions. Similar laws are attributed to Charondas.<sup>5</sup> Pittacus<sup>6</sup> attempted to discourage drunkenness by imposing a greater penalty upon those who had committed wrong while drunk than upon those who were sober. Zaleucus also attempted to restrict ornamentation in dress.<sup>7</sup> Various laws were passed also with regard to the conduct of women. Zaleucus limited the number of attendants of a woman who appeared in public, and forbade her departure from the city after nightfall.<sup>8</sup> Such laws are attributed also to Aristides of Ceos.<sup>9</sup>

<sup>1</sup> Diodorus xii. 21.

<sup>6</sup> Aristotle *Pol.* 1274b. 19 ff.

<sup>2</sup> Stobaeus *Flor.* 44. 22.

<sup>7</sup> Diodorus xii. 21.

<sup>3</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>4</sup> Dittenberger, *Sylloge*,<sup>2</sup> No. 468.

<sup>9</sup> Heracl. Pont., 9.

<sup>5</sup> Diodorus xii. 12. 3.

## CHAPTER IV

### THE PRE-SOLONIAN JUDICIARY

Draco, the Athenian lawgiver, "adapted his laws to a constitution which already existed."<sup>1</sup> Aristotle describes the political situation before the time of Draco as follows:

The magistrates were elected according to qualifications of birth and wealth. At first they governed for life, but subsequently for terms of ten years. The first magistrates, both in date and in importance, were the King, the Polemarch and the Archon. The earliest of these offices was that of the King, which existed from ancestral antiquity. To this was added, secondly, the office of Polemarch, on account of some of the kings proving feeble in war; for which reason Ion was invited to accept the post on an occasion of pressing need. The last of the three offices was that of the Archon, which most authorities state to have come into existence in the time of Medon. Others assign it to the time of Acastus, and adduce as proof the fact that the nine Archons swear to execute their oaths "as in the days of Acastus," which seems to suggest that it was in his reign that the descendants of Codrus retired from the kingship in return for the prerogatives conferred upon the Archon. Whichever way it be, the difference in date is small; but that it was the last of these magistracies to be created is shown by the fact that the Archon has no part in the ancestral sacrifices, as the King and Polemarch have, but only in those of later origin. So it is only at a comparatively late date that the office of Archon has become of great importance, by successive accretions of power. The Thesmothetae were appointed many years afterwards, when these offices had already become annual; and the object of their creation was that they might publicly record all legal decisions, and act as guardians of them with a view to determining the issues between litigants. Accordingly their office, alone of those which have been mentioned, was never of more than annual duration. So far, then, do these magistracies precede all others in point of date.

At that time the nine Archons did not all live together. The King occupied the building now known as the Bucolium, near the Prytaneum, as may be seen from the fact that even to the present day the marriage of the King's wife to Dionysus takes place there. The Archon lived in the Prytaneum, the Polemarch in the Epilyceum. The latter building was formerly called the Polemarcheum, but after Epilycus, during his term of

<sup>1</sup> Aristotle *Politics*, p. 1274b: Δράκοντος δὲ νόμοι μὲν εἰσὶ, πολιτεία δ' ὑπαρχούση τοὺς νόμους ἔθηκεν.

office as Polemarch, had rebuilt it and fitted it up, it was called the Epi-lyceum. The Thesmothetae occupied the Thesmotheteum. In the time of Solon, however, they all came together into the Thesmotheteum. They had power to decide cases finally on their own authority, not, as now, merely to hold a preliminary hearing. Such then was the arrangement of the magistracies. The Council of Areopagus had as its constitutionally assigned duty the protection of the laws; but in point of fact it administered the greater and most important part of the government of the state, and inflicted personal punishments and fines summarily upon all who misbehaved themselves. This was the natural consequence of the facts that the Archons were elected under qualifications of birth and wealth, and that the Areopagus was composed of those who had served as Archons; for which latter reason the membership of the Areopagus is the only office which has continued to be a life-magistracy to the present day.<sup>1</sup>

Along with the political functions of the king the three archons inherited judicial functions which tended to overshadow their other duties.<sup>2</sup> The assignment of judicial functions to the magistrates was characteristic of Greek legal systems. The archons did not sit as a body, but each archon adjudicated the cases assigned to him.<sup>3</sup> They had, in a sense, final jurisdiction, for not until the reforms of Solon was provision made for an appeal from the decisions of the magistrates to the heliaea.<sup>4</sup> No doubt a survival from a period when the jurisdiction of the archon was much wider is to be found in his proclamation, on entering office, to the effect that "whatever anyone possessed before he entered into office, that he shall possess and hold until the end of his

<sup>1</sup> *Ath. Pol.*, iii. Kenyon's translation.

<sup>2</sup> In the case of the polemarch, this can be definitely shown. Before the time of Cleisthenes there are several instances of Athenian generals in chief command in battle in place of the polemarch. Cf. Thompson, "The Athenian Polemarch," *Transactions of the American Philological Association*, 1894, p. xviii. At the battle of Marathon the position of the polemarch was purely honorary, a mere survival of the real power which he once possessed. Judicial duties tended to confine him to the city. When the Athenians began to send out commercial and colonizing expeditions, the generals must have assumed the actual command. Thompson concludes that the time when the polemarch lost his actual command cannot be determined, but the development of the *στρατηγία* must have begun about the end of the seventh century.

<sup>3</sup> In later times the archons performed certain functions as a college. Cf. *Ath. Pol.* iii. 5: ἐπὶ δὲ Σόλωνος ἅπαντες εἰς τὸ θεσμοθετεῖον συνήλθον; also lxiii. 1: τὰ δὲ δικαστήρια κληροῦσιν οἱ θ' ἀρχοντες κατὰ φυλὰς.

<sup>4</sup> *Ath. Pol.* ix. 1. Cf. *infra*, p. 151.

term."<sup>1</sup> The archon judged mainly cases in which the family was involved, that is, cases of injured parents, orphans, or heiresses. His jurisdiction was concerned also with civil suits, especially those dealing with property. The polemarch was for foreigners what the archon was for citizens, and the *archon basileus* conducted cases connected with religion. In particular, he was the presiding officer in homicide courts, which were of a religious nature because of the pollution involved.

Aristotle is the sole important authority for the origin and institution of the thesmothetae. The purpose of their creation was *ὅπως ἀναγράψαντες τὰ θέσμια φυλάττωσι πρὸς τὴν τῶν ἀμφισβητούντων κρίσιν*.<sup>2</sup> This is not a very explicit statement; Aristotle is probably etymologizing. Modern scholars have argued that their duty was either to reduce to writing the customary law in an authoritative form or to record the legal principles underlying the decisions either of themselves or of other judicial officers.<sup>3</sup> Either view presents difficulties. It is possible, however, that they were both judicial officers and in a sense also legislators.<sup>4</sup> It is quite natural that as

<sup>1</sup> *Ibid.*, lvi. 2; cf. Bury, *History of Greece*, p. 171; Busolt-Swoboda, *Staatskunde*, pp. 783 ff.; Meyer, *Geschichte des Altertums*, II, 348.

<sup>2</sup> *Ath. Pol.* iii. 4. A similar statement appears in the *Lexica Segueriana* (Bekker, *Anecdota*, I 264) and in Harpocration, s.v. *θεσμοθέται*.

<sup>3</sup> Cf. Lipsius, *Das Attische Recht*, p. 12, n. 44; Busolt, *Geschichte*, II, 177; Ziehen, *Rheinisches Museum*, LIV, 335 ff.; Wilamowitz, *Aristoteles und Athen*, I, 245; Sandys, on Aristotle, *ad loc.*; Botsford, *Athenian Constitution*, p. 129; Bury, *op. cit.*, p. 176; Ledl, *Studien zur älteren Athenischen Verfassungsgeschichte*, p. 269; *CAH*, III, 593; Meyer, *op. cit.*, II, 347; De Sanctis, *op. cit.*, p. 133; Busolt-Swoboda, *Staatskunde*, pp. 802 f.; Ehrenberg, *Die Rechtsidee im frühen Griechentum*, p. 107.

<sup>4</sup> There is by no means general agreement on the original functions of the thesmothetae. De Sanctis, *op. cit.*, p. 133, says: "L'essenziale nella loro operosità sarebbe sempre la giurisdizione e non la codificazione." Busolt, on the other hand, *Staatskunde*, p. 802, n. 2, says: "Es ist sehr fraglich, ob die Thesmothetai je ein selbständig richtendes Kollegium bildeten," and contends that their original functions were twofold: (1) to record the Thesmia (*θέσμια*); (2) to guard the *θέσμια* (i.e., they were *θεσμοφύλακες*). In the latter capacity, they stood in close connection with the Areopagus, and this duty explains why their annual office was continued from year to year. This part of Busolt's argument is unconvincing. It would seem that in the years between 621 (legislation of Draco) and 594 (legislation of Solon) they would have had practically nothing to do. And after his legislation, Solon extracted a promise from the people that his laws should remain in force for ten years. At this time, furthermore, we are expressly told that the guardianship of the laws

the city grew and judicial business increased, the need should be felt for additional officials to take care of the litigation which did not fall under the jurisdiction of any of the three archons.<sup>1</sup> To relieve the archons, the college<sup>2</sup> of the thesmothetae was created, presumably to take over cases which were not connected with the official duties of the three archons.<sup>3</sup> With their institution there came into existence, alongside of the magistrates with judicial functions, a body of special judicial officers. A definite attempt was thus made to systematize more highly the administration of justice. This practice is characteristic of other Greek judicial systems. In

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was in the hands of the Areopagus. Under these circumstances the continuity of the office of the thesmothetae is somewhat difficult to explain unless they had some other function. It is curious, as De Sanctis observes, that if they were wholly a legislative body there is no trace of their activities preserved. Cf. Myres, *The Political Ideas of the Greeks*, p. 219, who thinks that the records of the thesmothetae were not published at first. Aristotle says that the thesmothetae originally occupied the *thesmotheteion* alone. In the time of Solon the other archons joined them there (*ἐπὶ δὲ Σόλωνος ἄπαντες εἰς τὸ θεσμοθετεῖον συνῆλθον*). It is quite clear that Aristotle understood that all nine archons (*ἄπαντες*) had full judicial powers (*κύριοι . . . ἦσαν . . . κρίνειν*).

<sup>1</sup> The various theories which have been advanced regarding the number and origin of the thesmothetae have no bearing on this discussion. It has been suggested that they originated as *παρέδροι* or assistants to the other magistrates and were made independent judicial officers to take over part of the judicial business of these magistrates. Cf. Gilbert, *Constitutional Antiquities*, p. 113; Lecoutère, *L'archontat athénien*, p. 114; Myres, *op. cit.*, p. 215. This theory is inconsistent with their later activity as a college. Bury, *History of Greece*, p. 176, suggests that "the number of six was determined by the fact that they originated in a compromise between the orders, three being Eupatrids, two Georgi, and one a Demiurgos." De Sanctis, *op. cit.*, p. 137, contends that the number was not originally six, but that new thesmothetae were added as the number and importance of the cases which came before them increased.

<sup>2</sup> De Sanctis, *op. cit.*, p. 136, asserts that the thesmothetae did not act as a college, but separately. He argues also that the even number of six is opposed to their acting as a college. Grote believes that the thesmothetae sometimes acted as a board, sometimes individually (*History of Greece*, III, 74). Lipsius, *op. cit.*, p. 68, n. 60, is right in contending that they acted only as a college.

<sup>3</sup> It is quite possible that the thesmothetae came into existence at the time when the archonship was made an annual office. Busolt, *Geschichte*, II, 177, asserts that the institution could not have been created until the seventh century, so that Aristotle is correct in placing the institution after the beginning of the annual archonship. In 630 (attempt of Cylon) there were nine archons (Thucydides i. 126). So they must have been instituted about the middle of the seventh century.

the Gortyn code, for instance, the *κόσμοι*, or chief magistrates, had special judicial functions. For example, the *κόσμος ξένιος* in his character as judge, seems to be parallel to the polemarch at Athens. Aside from the *κόσμοι*, there were special judicial officers, referred to always as *δικασταί*. They correspond in a general way, in so far as they were specially appointed for judicial purposes, to the thesmothetae. This is a normal development which was bound to take place with the expansion of the state and the consequent growth of litigation.

In applying customary law to specific cases and recording their decisions, the thesmothetae were, in a sense, legislators, because, as has been well said, "in the absence of a written code, those who declare and interpret the laws may be properly said to make them."<sup>1</sup> It may be suggested that the practice of recording judicial decisions was new at the time of their institution, and that their name is due to the novelty of the custom now followed by all magistrates. Aristotle employs the word *θέσμα*. The more common form *θεσμοί*, analogous to the *θέμιστες* of Homer, includes both general laws and particular sentences.<sup>2</sup> The two ideas are not yet distinguished. General law is conceived only in its application to some particular case. "The thesmothetae, therefore, received their name not merely from the fact that they made law by administering it, but from being the first to lay it down in written decisions."<sup>3</sup>

The advantage of this explanation is that it accounts for the later twofold function of the thesmothetae in the fifth and fourth centuries. Aside from their strictly judicial business which included a large variety of cases, they had general supervision of the laws and directed their annual revision.<sup>4</sup> These duties were a natural outgrowth of their early

<sup>1</sup> Thirlwall, *History of Greece*, II, 17, quoted by Sandys, *op. cit.*, p. 8.

<sup>2</sup> Grote, *op. cit.*, III, 75.

<sup>3</sup> Kenyon, *Aristotle's Constitution of Athens*, p. 8. Cf. De Sanctis, *op. cit.*, p. 133; "Testmoteta è in realtà ogni giudice in quanto afferma dei principi di diritto applicandoli al caso speciale."

<sup>4</sup> Gilbert, *op. cit.*, p. 302.



activities as makers and recorders of judicial decisions. In the fifth and fourth centuries the thesmothetae were mainly concerned with criminal cases. Civil suits ordinarily came before the Forty and the *εισαγωγείς*. In the early period, cases that intimately concerned the whole public were dealt with by the body most representative of public opinion. Thus, in Homer the assembly was the normal medium for the expression of such public will as there was.<sup>1</sup> Under the aristocracy in Athens in the pre-Solonian period the Areopagus was the most suitable body for taking public action. Now the jurisdiction of the thesmothetae must have fallen between that of the Archons and that of the Areopagus. This would include both criminal and civil suits.<sup>2</sup>

The sovereignty of the state was vested in a council which represented the ruling aristocracy. Whether this council is identical with the Areopagus is a question that was discussed as early as the time of Aristotle. Some believed that the Areopagus was the creation of Solon; others that it was the outgrowth of the Homeric Council of Elders.<sup>3</sup>

As to Solon, he is thought by some to have been a good legislator, who put an end to the exclusiveness of the oligarchy, emancipated the people, established the ancient Athenian democracy, and harmonized the different elements of the state. According to their view, the council of the Areopagus was an oligarchical element, the elected magistracy, aristocratical, and the courts of law, democratical. The truth seems to be that the council and the elected magistracy existed before the time of Solon, and were retained by him, but that he formed the courts of law out of all

<sup>1</sup> Cf. *supra*, p. 22.

<sup>2</sup> Aristotle's words *τὴν τῶν ἀμφισβητούντων κρίσιν* (*Ath. Pol.* iii. 3) may indicate, as De Sanctis believes (*op. cit.*, p. 136), that the majority of the cases which originally came before them were civil suits. It may be a matter of accident that, in divesting themselves of a part of their duties as litigation increased, they tended to reserve criminal cases for themselves and to turn over civil suits first to the *δικασταὶ κατὰ δῆμους* and later to other officials, namely the Forty and the *εισαγωγείς*. Cf. *infra*, p. 348. The revival of the circuit judges in 453-452 B.C. was for the express purpose of giving other officials relief from civil actions (cf. De Sanctis, *op. cit.*, p. 136). Many of these would have come under the jurisdiction of the thesmothetae. Calhoun, *Criminal Law*, pp. 102 f., attributes the taking away of civil suits from the thesmothetae to the great expansion and systematization of the criminal law which took place in the first half of the fifth century.

<sup>3</sup> Aristotle *Politics*, 1273b ff. Jowett's translation.

the citizens, thus creating the democracy, which is the very reason why he is sometimes blamed.

In modern times this problem has occasioned much discussion because of the apparent contradictions in some of the ancient sources and the difficulty of interpreting them.<sup>1</sup> The majority of these ancient sources, however, are subsequent to Aristotle. Their evidence and many of the speculations of modern scholars on the subject were superseded by the recovery of Aristotle's *Constitution of Athens*, which confirms his statement in the *Politics*, if confirmation is needed. In his account of the constitution before the time of Draco, Aristotle gives the following description of the Areopagus:

The Council of Areopagus had as its constitutionally assigned duty the protection of the laws; but in point of fact it administered the greater and most important part of the government of the state and inflicted personal punishments and fines summarily upon all who misbehaved themselves. This was the natural consequence of the fact that the Archons were elected under qualifications of birth and wealth, and that the Areopagus was composed of those who had served as Archons; for which latter reason the membership of the Areopagus is the only office which has continued to be a life-magistracy to the present day.<sup>2</sup>

Before the time of Solon, there existed only one council, which had both judicial and deliberative functions.<sup>3</sup> This council was a lineal descendant of the Homeric boulé.<sup>4</sup> The dispute as to whether it was called ἡ ἐν Ἀρείῳ πάγῳ βουλή in

<sup>1</sup> For the ancient sources, which treat the Areopagus mainly as a homicide court, cf. *infra*, p. 92. For a summary of the later literature on the subject, cf. Busolt-Swoboda, *Staatskunde*, p. 794, n. 2. For a convenient summary of modern theories on the subject, cf. Ledl, *op. cit.*, pp. 286 ff. Cf. also Treston, *Poine, A Study in Ancient Greek Blood-Vengeance*, pp. 269 ff.

<sup>2</sup> *Ath. Pol.* iii. 6. Kenyon's translation. The scholars who attack the theory that the Areopagus existed before Solon's time reject this passage as an interpolation on the basis of its similarity to the description of the Areopagus under Solon.

<sup>3</sup> Cf. *Ath. Pol.*, iv, for the alleged Draconian council. Cf. *infra*, pp. 136 ff.

<sup>4</sup> Actually as the most representative group in the aristocracy, the council is comparable to the Homeric assembly which dealt with offenses affecting the whole community. It would appear that the arbitral functions of the ancient boulé and the spontaneous judicial functions of the assembly are in a measure combined in the aristocratic council at Athens. For example, it would be the natural body to try cases of homicide, treason, and impiety. In the ancient traditions the Areopagus appears as a famous homicide court.

the early period is of no moment.<sup>1</sup> It is possible that at the time when a second council, the *boulé*, was instituted, the Council of Elders received the name of Areopagus, by which it was known in later times. It may also be true that the council thus received its name in the time of Solon and that on this account its institution was ascribed to him. There was, however, a marked tendency among Athenians to refer their ancient institutions to Solon, and to this tendency may be due the idea that the Areopagus was instituted by him.<sup>2</sup>

Before the unification of Attica the local chiefs did not resort to Athens<sup>3</sup> "to take counsel with the king except in times of national danger." But when Theseus dissolved the local councils and established a central council in the capital, there must have been large additions to its permanent membership. Not only were the independent kings in Attica included, but a proportion, if not all, of the members of the local senates. The resulting powers and prestige of this council enabled it eventually to substitute for the kingship an aristocratic oligarchy governed by magistrates drawn from its own membership. On the expiration of their tenure of office they naturally resumed their former status as members of this council. This explains why, in the later period, the archons, although they were no longer drawn from the mem-

<sup>1</sup> Cf. Headlam, *Class. Rev.*, VI, 295: "The later council of the Areopagus was then the representative of an older Council, the origin of which was lost in antiquity, but which was doubtless descended from the Homeric Council of Elders. It is, however, not so clear that we must follow him (Aristotle) in calling the old Council by the name which it had in later times. If, as seems most probable, there was only one Council then it would certainly be called ἡ *βουλή*; it may have been connected with the *Ἄρειος πάγος*; if so, the name is not incorrect; but, if I am right in supposing that there was no older authority than Solon, Aristotle's use of the name for the early period means nothing more than continuity of existence, and does not tell us anything of the earlier usage. Without then necessarily accepting the statement that the Council had always been called after the Areopagus, we may consider it as almost certain that the Council of the Areopagus was substantially identical with the early Council."

<sup>2</sup> Busolt-Swoboda, *Staatskunde*, pp. 794 ff., gives as the normal development in the Greek state the continuance of the Council of Elders from the time of the oligarchy as an executive and judicial body alongside the Council of the democracy. So in Athens the old council continued as the Areopagus alongside the Council of Four Hundred. Cf. De Sanctis, *op. cit.*, pp. 140 ff.

<sup>3</sup> Thucydides ii. 15.

bership of the council (Areopagus), became members on the expiration of their term of office. With the growth of trade and commerce, land ceased to be the sole form of wealth. The political importance of the *nouveaux riches* secured for them the right to participate in the magistracies along with the eupatrids. And so the membership of the senate came to be recruited on the basis of birth and wealth.<sup>1</sup>

Such an explanation of the origin of the Areopagus fully recognizes the historical continuity of institutions and depends upon the authority of Aristotle, whose critical knowledge of the history of Athenian institutions makes him a more reliable source of information than any of the other ancient writers who discussed the history of the Areopagus.

The chief evidence which has been used against the foregoing view is that of Pollux to the effect that Draco instituted the ephetae who sat in all five homicide courts and that, in addition to them, Solon instituted the Council of the Areopagus: Δράκων δ' αὐτοὺς κατέστησεν ἀριστίνδην αἰρεθέντας· ἐδίκασον δὲ τοῖς ἐφ' αἵματι διωκομένοις ἐν τοῖς πέντε δικαστηρίοις. Σόλων δ' αὐτοῖς προσκατέστησε τὴν ἐξ Ἀρείου πάγου βουλὴν.<sup>2</sup> On the basis of this statement, Ledl<sup>3</sup> makes a distinction between the court of the Areopagus and the Council of the Areopagus, declaring that Pollux is correct in supposing that the court existed in the time of, and prior to, Draco, but that the institution of the council must be attributed to Solon. At the same time he admits that Pollux is wrong in assigning the ephetae as judges to the court of the Prytaneum. In view of Pollux' blunder in making the Prytaneum an ephetic court, it is better to say that he is in error also with regard to the court of the Areopagus than to try to explain his reference to it as Ledl does, for Ledl is forced, in the end, to admit that the ephetae never sat in the court of the Areopagus, but rather that a pre-Solonian council sat there, whose duties were divided by Solon between the Council of the Areopagus and the Council of the Four Hundred, the judicial

<sup>1</sup> Aristotle *Ath. Pol.* iii. 6: ἡ γὰρ αἰρεσις τῶν ἀρχόντων ἀριστίνδην καὶ πλουτίνδην ἦν, ἐξ ὧν οἱ Ἀρεοπαγῖται καθίσταντο.

<sup>2</sup> viii. 125.

<sup>3</sup> *Op. cit.*, pp. 296 f.

functions being chiefly assigned to the Areopagus. His argument fails to recognize that the Areopagus of Solon's time was nothing more than a development of this pre-Solonian council to which were assigned all of the judicial functions, which Ledl admits formerly belonged to the pre-Solonian council, as well as some of the executive-administrative functions. By failing to recognize this continuity, he is led to reject the testimony of Aristotle in favor of the inferior testimony of Pollux, whose statement regarding the ephetic composition of the Areopagus during the time of Draco is admittedly wrong. There is obviously, then, no justification for accepting his other statement regarding its institution by Solon when it is at variance with the evidence both of the *Politics* and of the *Constitution of Athens*. Ledl is unduly skeptical in refusing to admit that the court was also a council of state. It was characteristic of Greek states that administration of justice was very closely connected with the government, and magistrates and governing bodies regularly exercised judicial functions. If, then, there was a court sitting on the Areopagus, it is more than likely that it was a political body as well.

The antiquity of the homicide functions of the Areopagus is attested by the myths which represent it as a homicide court. In a fragment of Hellanicus there are collected all the mythical trials for homicide which were believed to have taken place before the Areopagus.<sup>1</sup> This account is found also on the Parian Marble,<sup>2</sup> in Euripides,<sup>3</sup> Demosthenes,<sup>4</sup> and Pausanias.<sup>5</sup> And the name of the hill was attributed to the fact that Ares was the first to be tried there.<sup>6</sup> Plutarch believed that the Areopagus was in existence before the time of Solon:

<sup>1</sup> Scholiast on Euripides *Orestes*, 1648.

<sup>2</sup> *Ep.* 3.

<sup>3</sup> *Electra*, 1258 ff. For dramatic purposes Aeschylus, in the *Eumenides*, changed the order given by the other writers and represented the court as being first instituted to try Orestes.

<sup>4</sup> xxiii. 65 f.

<sup>5</sup> i. 28. 5.

<sup>6</sup> Pausanias, *ibid.* Cf. Suidas, "Ἀρεῖος πάγος."

Now most writers say that the Council of the Areopagus, as I have stated, was established by Solon. And their view seems to be strongly supported by the fact that Draco nowhere makes any mention whatsoever of Areopagites, but always addresses himself to the "ephetai" in cases of homicide. Yet Solon's thirteenth table contains the eighth of his laws recorded in these very words: "As many of the disfranchised as were made such before the archonship of Solon, shall be restored to their rights and franchises, except such as were condemned by the Areopagus, or by the ephetai, or in the prytaneium by the kings, on charges of murder or homicide, or of seeking to establish a tyranny, and were in exile when this law was published." This surely proves to the contrary that the council of the Areopagus was in existence before the archonship and legislation of Solon. For how could men have been condemned in the Areopagus before the time of Solon, if Solon was the first to give the council of the Areopagus its jurisdiction? Perhaps, indeed, there is some obscurity in the document, or some omission, and the meaning is that those who had been convicted on charges within the cognizance of those who were Areopagites and ephetai and prytanes when the law was published, should remain disfranchised, while those convicted on all other charges should recover their rights and franchises. This question, however, my reader must decide for himself."<sup>1</sup>

An attempt has been made to explain the statement of Pollux quoted above by supposing that during the time of Draco all homicide trials came before the ephetae and that Solon restored jurisdiction in cases of premeditated homicide to the Areopagus. But it is quite unlikely that Draco should have taken a function of such prime importance from the chief governing body of the state. The Athenians were too conservative in matters involving religion to do anything of this sort.<sup>2</sup> The natural conclusion from the foregoing evidence is that the Areopagus in Draco's time and before Draco's time had charge of cases of premeditated homicide in addition to the other cases which had always come within their jurisdiction.<sup>3</sup> The king was chairman of his council.

<sup>1</sup> *Solon*, xix. Perrin's translation. Plutarch doubtless knew the homicide laws only in their revised form of 409-408 B.C.

<sup>2</sup> Cf. Freeman, *The Work and Life of Solon*, p. 55: "The utmost that can be conjectured with any probability is that for a time the Areopagus deputed trial for wilful murder to a court of fifty-one of its members, and that Solon restored the old order of trial by the whole body." For an explanation of the source of Pollux' error, cf. *infra*, p. 100.

<sup>3</sup> Cary in *CAH*, III, 590, says that the judicial functions of the Areopagus were confined to criminal actions.

Consequently, the magistrates who succeeded him must have presided over its deliberations. The evidence for this conclusion is found in the participation of the king archon in the deliberations and verdict of the Areopagus acting as a homicide court. The amnesty law shows that the king archon presided at other judicial sessions of the Areopagus as well as at homicide trials.<sup>1</sup> This practice is a survival from the time when the king and his council administered justice. Conservatism explains why the *archon basileus* rather than the archon exercised this royal prerogative.

The title "boulé" shows clearly that the Areopagus was primarily a deliberative body, but there is no information regarding its sessions available. In its capacity as a deliberative body it is possible that the college of archons, like the later prytaneis of the Senate of Five Hundred, constituted a presiding committee under the chairmanship of the archon. Other possibilities readily suggest themselves, but, in view of our total lack of information on the subject, speculation is futile.<sup>2</sup>

Beyond Aristotle's statement that "the Areopagus administered the greater and most important part of the government," nothing is known about its functions—deliberative, administrative, and executive. It elected the magistrates and, by virtue of its guardianship of the laws, must have exercised some control over them during their incumbency of office. Foreign relations, including the negotiation of treaties and the making of peace and war, would naturally be included in τὰ πλεῖστα καὶ τὰ μέγιστα, as well as some control over the finances of the state, such as providing and allotting funds for war, for public buildings, for the celebration of religious festivals, and for the public service in general. Its service to the state on the eve of Salamis was really a resumption in a small way of the early financial functions which in the fifth century had been given to the Council of Five Hundred. To Aristotle we are indebted for an account of

<sup>1</sup> Cf. *infra*, p. 109; cf. Vinogradoff, *op. cit.*, p. 181.

<sup>2</sup> CAH, III, 589-90. For retention of the name βουλή, cf. Busolt-Swoboda *Staatskunde*, p. 795; De Sanctis, *op. cit.*, p. 143.

this instructive incident. When the generals were utterly at a loss how to meet the crisis and made proclamation that everyone should see to his own safety, the Areopagus provided a donation of money, distributing eight drachmas to each member of the ships' crews, and so prevailed on them to go on board. This timely action enabled the Athenians to fight the Battle of Salamis.<sup>1</sup> •

Great importance has always been attached to the due administration of the law on the part of the magistrates.<sup>2</sup> In pre-Solonian Athens the responsibility of seeing that the magistrates enforced the law rested with the Areopagus, which "had as its constitutionally assigned duty the protection of the laws." Its authority was enforced by the infliction of suitable pains and penalties. The guilt or innocence of a person accused before the Areopagus was ascertained by a more or less formal inquiry. No source contains information about procedure before the Areopagus in non-homicide cases. It can only be surmised that the Areopagus acted as the result of information laid by one of its members. The original informant would usually be the person who had suffered from the failure of a magistrate to observe and uphold the laws. If he appeared at all, he would be a complaining witness and an Areopagite would be the nominal prosecutor. These surmises explain very naturally a provision of the code of Draco. It is specified that the Areopagus was to see that "the archons governed according to the laws." Any person who was wronged might lay information before the Areopagus, indicating what law had been transgressed.<sup>3</sup> This is a privilege of prime importance comparable with the right of petition in modern times. It meant that an aggrieved person need not depend upon enlisting the interest and efforts of an Areopagite in order to get justice; he had the right to appear in person before the assembled council and state his case. This was the means adopted by Draco to insure the

<sup>1</sup> *Ath. Pol.* xxiii. 1. Cf. *infra*, p. 251.

<sup>2</sup> Since the days of Solon officials everywhere have been sworn to uphold the law.

<sup>3</sup> *Ath. Pol.* iv. 4. Cf. *infra*, p. 166.



enforcement of his laws.<sup>1</sup> Draco thus recognized the right of the injured person to take the initiative in his own case.

One is immediately confronted with the question as to whether the control of the Areopagus extended to the judicial decisions of the magistrates. Aristotle says that "the archons had power to decide cases finally on their own authority, not as now, to hold a preliminary hearing merely."<sup>2</sup> This is Kenyon's version. But there is more in Aristotle's statement than can be expressed in a translation. Aristotle is comparing the pre-Solonian archon with the archon of his own day who was little more than a clerk. As a judge, he could only decide on the question of his own jurisdiction; his decision did not affect the main issue. *αὐτοτελεῖς κρίνειν* must be understood as the opposite of *προανακρίνειν*. Hence, we get the idea of an independent judgment regarding the whole matter at issue. There was no provision for an appeal in each and every case, such as was granted by Solon to a regularly constituted court of appeal. But Aristotle's words do not mean that the Areopagus could not, in the exercise of its function as guardian of the laws, nullify or reverse the decision of a magistrate who had failed to observe the law. The only difference between annual magistrates and other rulers, such as kings and tyrants, lies in the full responsibility of the former. The substitution of annual magistrates for the life-tenure kingship in Athens meant that the magistrates were fully responsible to the sovereign body in the state, viz., the Areopagus. There is no indication that the aristocracy had developed an elaborate procedure of accounting like the democratic *εἵθηνα*; but even if the means of insuring responsibility of magistrates for their official acts were less formal, we may be certain they were not less effective.

The language of Aristotle further indicates that the Areopagus dealt with offenders *contra bonos mores*. To the same effect is the statement of Isocrates that the early Athenians

<sup>1</sup> This was always a prime concern of all ancient legislators.

<sup>2</sup> *Ath. Pol.* iii. 5: κύριοι δ' ἦσαν καὶ τὰς δίκας αὐτοτελεῖς κρίνειν καὶ οὐχ ὥσπερ νῦν προανακρίνειν.

gave the Areopagus the task of insuring good behavior on the part of the citizens.<sup>1</sup> For the more effective carrying-out of this purpose the city was distributed by wards (*κῶμαι*) and the country by demes. The Areopagites inspected the life of each citizen and brought the disorderly (*ἀκοσμοῦντες*) before the council. Some the council warned, some it threatened, and others it punished suitably. This is a rather fanciful picture, but it reflects the traditional view that the Areopagus exercised censorial powers. But the Areopagus was more than a *censor morum*; it was a criminal court. There are no records of its activities in this capacity except in the amnesty law where it is mentioned, according to the most natural interpretation, as the court which tried those who attempted to establish tyranny.<sup>2</sup> It was undoubtedly the court that dealt with treason and other crimes that endangered the safety of the state.

The Areopagus, then, is nothing more than the old aristocratic senate which developed out of the Council of Elders of the Homeric age. Its twofold function, judicial and political, is quite in accord with the system in vogue in other states. For example, the Council of Elders in Crete, composed of those who had held the office of *κόσμος*, acted both as a council of state and as a court.<sup>3</sup> At Sparta, the Gerousia, the main function of which was political, was also a court which dealt with criminal cases.<sup>4</sup>

A discussion of the Areopagus inevitably involves an examination of the identity and institution of the ephetae, who tried cases of homicide in the Palladium, the Delphinium, and in Phreatto. The question of the origin of this body and

<sup>1</sup> *Areop.*, 46: ἀλλὰ διελόμενοι τὴν μὲν πόλιν κατὰ κώμας, τὴν δὲ χώραν κατὰ δήμους, θεώρουν τὸν βίον τὸν ἐκάστου, καὶ τοὺς ἀκοσμοῦντας ἀνήγον ἐἰς τὴν βουλὴν. ἡ δὲ τοὺς μὲν ἐνουθέτει, τοῖς δ' ἡπέλκει, τοὺς δ' ὡς προσήκεν ἐκόλαζεν. For the use of committees by the Areopagus, cf. *infra*, p. 258.

<sup>2</sup> Lipsius, *op. cit.*, pp. 23 and 33, has a different view of the amnesty law (cf. *infra*, p. 106). De Sanctis, *op. cit.*, p. 149, takes the correct view of the Areopagus in the amnesty law.

<sup>3</sup> Cf. Gilbert, *Griechische Staatsaltertümer*, II, 221.

<sup>4</sup> Cf. Gilbert, *Constitutional Antiquities*, p. 80.

its relation to the Areopagus presents peculiar difficulties because of the meager ancient evidence on the subject.<sup>1</sup> An ancient source mentions an age qualification according to which the ephetae were required to be above fifty years of age.<sup>2</sup> There are examples of preference being given to men over fifty years of age, in view of which some scholars have accepted the fifty-year requirement in the case of the ephetae. An example of the fifty-year qualification is found in a law of Solon which gave precedence in speaking before the assembly to those who had passed this age.<sup>3</sup> It is claimed, also, that men over fifty years of age were preferred as ambassadors.<sup>4</sup> In view of the fact that there was no such qualification for members of the Areopagus who tried the most serious homicide cases, it is quite unlikely that there was such a requirement in the case of the ephetae who sat in the minor homicide courts. The age qualification occurs only in two late lexicographers. In all probability it is the result of confusion with the number of the ephetae, which is indubitably established for the time of Draco as fifty-one.<sup>5</sup> When

<sup>1</sup> On the ephetae, cf. Lange, "Die Epheten und der Areopag vor Solon," *Abhand. d. sächs. Gesellschaft d. Wissen.*, 1874, pp. 178 ff.; Philippi, *Der Areopag und die Epheten*; De Sanctis, *op. cit.*, pp. 169 ff.; Busolt-Swoboda, *Staatskunde*, pp. 803 ff.; Gilbert, *Beiträge*, pp. 491 ff.; Miller, article "Ephetai" in Pauly-Wissowa; Lipsius, *op. cit.*, p. 15; Treston, *op. cit.*, pp. 263 ff.; Glotz, *Solidarité*, pp. 299 ff.; Myres, *op. cit.*, p. 227; Vinogradoff, *op. cit.*, pp. 187 ff.

<sup>2</sup> Suidas and Photius, *s.v.* ἄνδρες ὑπὲρ ὅττη γεγονότες καὶ ἀριστα βεβιωκέναι ὑπόληψιν ἔχοντες οἱ καὶ τὰς φονικὰς δίκας ἐκρινον.

<sup>3</sup> Aeschines *Tim.* xxiii: τίς ἀγορεύειν βούλεται τῶν ὑπὲρ πεντήκοντα ἔτη γεγονότων. Cf. *Ctesiph.* iv; Gilbert, *Constitutional Antiquities*, p. 294.

<sup>4</sup> Plutarch *Pericles*, xvii; *CIA* i. 40. 17. Poland, *De legationibus Graecorum publicis*, p. 52, contends that there was once a law forbidding men to be sent on embassies who were not at least fifty years of age, but that the law early fell into disuse. Krech, *De Crateri ψηφισμάτων συναγωγῇ*, p. 36, n. 48, believes that there never was such a law, but that it was customary to send the older men on such missions. If there had been a law to this effect, there would be no reason for the inclusion of the age specification in the inscription.

<sup>5</sup> *CIA* i. 61. Zonaras, p. 926, erroneously gives the number as eighty. There is no known historical reason for the number fifty-one, and the attempts to explain it have been many and ingenious. Lange, *op. cit.*, pp. 204 ff., believes that the Areopagus was composed of fifteen men from each of the four pre-Cleisthenean tribes and that the ephetae consisted of the same body minus the nine archons. Müller (Introduction to Aeschylus' *Eumenides*) suggested that the number included five

once confusion arose, comparison with other age qualifications would tend to confirm it.

Quite a simple and natural explanation of the origin of the ephetae lies ready to hand. The ephetae were really a commission of the Areopagus. The odd number at once suggests the analogy of the later popular courts of two hundred and one and of five hundred and one.<sup>1</sup> The tendency of institutions to persist in more or less modified form, even when political conditions are fundamentally changed, points in the same direction. The ephetae are the prototype of the popular courts. The odd number is intended to prevent a tie. It is uncertain whether the *archon basileus* was one of the fifty-one ephetae or whether he merely acted as the presiding officer. In favor of the former view it may be argued that, since he voted in the Areopagus, he voted in the courts of the ephetae also. It cannot be assumed that he voted in addition to the fifty-one ephetae, for that would have destroyed the old number. If he voted at all, it was as an ephetes. On the other side it may be argued that as the chairman of the popular courts did not vote, so the *archon basileus* did not vote in the ephetic courts. The sharp distinction made between the *archon basileus* and the ephetae in the Draconian code has led many to believe that he was not an ephetes.

A fragment of Philochorus also suggests that the ephetae were recruited from the Areopagus.

ἐκ γὰρ τῶν ἐννέα καθισταμένων ἀρχόντων Ἀθήνησι τοὺς Ἀρεοπαγίτας ἔδει συνεστάναι δικαστάς, ὥς φησιν Ἀνδροτίων ἐν δευτέρῳ τῶν Ἀτθίδων ὕστερον δὲ πλείονων γέγονεν ἢ ἐξ Ἀρείου πάγου βουλῇ· τουτέστιν ἐξ

from each of the Cleisthenean tribes with the addition of the *archon basileus*. Schoemann, *Antiq. jr. publ.*, p. 171, advanced the theory that the ephetae were a combination of twelve men chosen from each of the four pre-Cleisthenean tribes, and three exetetae. A variation of Schoemann's theory is a substitution of the *archon basileus* and his two *paredroi* for the exetetae. The attempt to identify the ephetae with the *naucraro*i has met with slight approval.

<sup>1</sup> Headlam, *Class. Review*, VI, 252 and 297, suggests that the court of the fifty-one ephetae must have been the model for the later popular courts with panels of odd numbers. Neither Headlam himself nor subsequent writers recognized the importance of the suggestion for the solution of the much vexed question of the institution of the ephetae. Cf. Wilamowitz, *Aristoteles und Athen*, I, 251, n. 137; Gilbert, *Griechische Staatsaltertümer*, I, 137, n. 1.

ἀνδρῶν περιφανεστέρων πεντήκοντα καὶ ἑνός. Οὐ παντὸς ἀνδρὸς ἦν εἰς τὴν ἐξ Ἀρείου πάγου βουλήν τελεῖν· ἀλλ' οἱ παρ' Ἀθηναίοις πρωτεύοντες ἐν τε γένει καὶ πλούτῳ καὶ βίῳ χρηστῶ, κ.τ.λ.<sup>1</sup>

It is obvious that Androtion, knowing the original number of ephetae, who in his time had of course been replaced by dicastic courts, thought that the membership of the Areopagus was fifty-one; and it is also obvious that he was, in this passage, making an attempt to distinguish between the ephetae (i.e., τοὺς Ἀρεοπαγίτας δικαστάς) and the Council of the Areopagus. At any rate, the passage indicates that Androtion considered the ἐφέται Areopagites.<sup>2</sup>

The ephetae could not continue to be a single group of fifty-one specific individuals. Owing to possible illness, if for no other reason, there could be no assurance that any body of fifty-one men would always be available for service when required, if, indeed, an odd number was always required.<sup>3</sup> The only means of assuring the attendance of the full complement of fifty-one would be to draw them from a larger body as need arose. Obviously this group was the Areopagus. Some confirmation of this is to be found in a statement of Pollux, to the effect that before Solon the ephetae sat in the Areopagus: ἐδίκαζον δὲ τοῖς ἐφ' αἵματι διωκομένοις ἐν τοῖς πέντε δικαστηρίοις.<sup>4</sup> Pollux' error in regard to the Areopagus is quite natural if the ephetae were drawn from the membership of the Areopagus. As to the method of selection, there

<sup>1</sup> F.H.G. (ed. Müller), I, 394.

<sup>2</sup> Headlam, *op. cit.*, p. 251, considers that the passage makes a clear distinction between Ἀρεοπαγίται δικασταὶ and ἡ ἐξ Ἀρείου πάγου βουλή. The ἐφέται would be the πεντήκοντα καὶ εἰς, and these were taken from the ex-archons. The ἐφέται were not identical with the council. Freeman, *op. cit.*, p. 53, follows Headlam and says: "According to Androtion they [the ephetae] were chosen from ex-archons, that is, from the Areopagus." Freeman fails to note that the theory that the ephetae were really commissions of the Areopagus, which had been hinted at by Headlam, was developed by Gertrude Smith, *The Administration of Justice from Hesiod to Solon*, p. 17. Cf. S. B. Smith, "The Establishment of the Public Courts at Athens," *TAPA*, LVI, 110. In Treston's opinion (*op. cit.*, pp. 269 ff.) the pre-Solonian Areopagus was not really distinguishable from the ephetae.

<sup>3</sup> If the law providing for acquittal in case the vote was even was in force, an odd number could be dispensed with on occasion. Cf. *infra*, p. 239.

<sup>4</sup> Pollux viii. 125. The five homicide courts were the Areopagus, the Palladium, the Delphinium, in Phreatto, and the Prytaneum.

can be little doubt that it was by lot, which was often employed in oligarchic constitutions.<sup>1</sup>

The etymologies of *ἐφέτης* commonly given do not support this interpretation.<sup>2</sup> Another derivation—from *ἐπίεσθαι*—may be suggested. If the word be understood in the passive sense, it can mean “men sent out as a commission” from a larger body. There may be some difficulty in understanding the word passively, since nouns in *-της*, denoting agent, are regularly active in force. It is not impossible, however, that the noun should have come from the verbal in *-τος* and that under the influence of names of other officials ending in *-της*, it was changed by analogy from *ἐφετος* to *ἐφέτης*. This explanation of the word is supported by the word *ἀφέτης*, which is used passively of a freed slave.<sup>3</sup>

References to a class qualification are found in the passages quoted from Pollux and Androtion. Possibly Pollux derived his statement that they were chosen *ἀριστίνδην*,

<sup>1</sup> The membership of the ephetae could have been varied from time to time, for the number of Areopagites must regularly have been more than two hundred. Cf. S. B. Smith, *op. cit.*, p. 114, n. 39.

<sup>2</sup> The word occurs in the sense of chief in Aeschylus' *Persae*, 79; but this is of no assistance here. Pollux regarded the ephetae as a court of appeal, thus deriving the name from *ἐφέσιμος*. This description of the court Lipsius pronounces impossible both linguistically and on the ground of the facts in the case (*op. cit.*, p. 15, n. 53). He himself derives the word from *ἐπίεσθαι* (connected with *ἐφεμή*) and defines it as *Anzeiger des Rechts*, equivalent apparently to the later *ἐξηγητής*. Schoemann much earlier had claimed this same etymology for the word, but explained it as their determination of how the accused was to be dealt with in individual cases (*De Areopago et ephetis*, pp. 7 f.). But Philippi has shown that such a name might apply equally well to any college of judges (*Der Areopag und die Epheten*, p. 213). He himself accepts Lange's explanation (*De ephetarum Atheniensium nomine*, pp. 11 ff.) that the word is a compound of *ἐπί* and *ἔραυ*, i.e., “representatives of the citizens standing in the condition of relationship to one another.” According to this view, however, they would constitute an administrative council as well as a homicide court, which was not the case. There is no evidence that as ephetae they had any functions aside from their activity as a homicide court. De Sanctis' view that they had to do with granting permission for religious purification is not deserving of serious consideration (*op. cit.*, pp. 169 f.). Ledl, *op. cit.*, pp. 335 f., derives the word from *ἐφέναι* in the sense that the ephetae permit an objection of the defendant to the plaintiff's conception of the act; i.e., they determine whether he shall be tried on a charge of murder or involuntary or justifiable homicide.

<sup>3</sup> Athenaeus, 271 F: Μύρων δὲ ὁ Πιρηνεὺς ἐν δευτέρῳ Μεσσηνιακῶν πολλάκις, φησὶν, ἡλευθέρωσαν Λακεδαιμόνιοι δούλους καὶ οὓς μὲν ἀφέτας ἐκάλεσαν, κ.τ.λ.

from the law of Draco.<sup>1</sup> But if this is the case, he has misinterpreted the law: *τούτους δὲ οἱ πεντήκοντα καὶ εἰς ἀριστινδὴν αἰρῆσθων*. The word *ἀριστινδὴν* refers not to the class from which the ephetae were chosen but to that from which they were to choose a certain number of phratry members. If Pollux' statement be accepted at its face value, it can only be understood to mean that the institution came into existence before the *nouveaux riches* were included in the aristocracy. But the *nouveaux riches* before the time of Draco were eligible for magistracies. Hence, they could not be excluded from the Areopagus. The explanation must be that the old qualification continued to be used after the *nouveaux riches* were admitted to office, but was understood to include all members of the aristocracy whether by wealth or by birth.

There are no means of determining whether a fresh group of ephetae was drawn for each case or whether others were selected to fill the gaps due to death, illness, or other causes, leaving the personnel the same as far as possible. The analogy of the popular courts does not help. The practice differed at different periods.<sup>2</sup>

According to Plutarch, the Alcmaeonidae who were involved in the curse of Cylon were tried by a court of three hundred selected from the aristocracy.<sup>3</sup> This has led to the belief on the part of some scholars that there was in Athens a second council, composed of three hundred members.<sup>4</sup> But there is no evidence whatever for any further activity on the part of such a body, and it is much more plausible to suppose that a special court was provided for this very important case.<sup>5</sup> Vinogradoff says, "In a sense the tribunal of the

<sup>1</sup> Pollux viii. 125: *ἐφέται τὸν μὲν ἀριθμὸν εἰς καὶ πεντήκοντα, Δράκων δ' αὐτοὺς κατέστησεν ἀριστινδὴν αἰρῆσθωντας*.

<sup>2</sup> Cf. Lipsius, *op. cit.*, pp. 137 f. Cf. *infra*, p. 242.

<sup>3</sup> *Solon*, xii.

<sup>4</sup> Cf. Philippi, *op. cit.*, pp. 240 ff.

<sup>5</sup> Cf. Wilamowitz, *op. cit.*, II, 55: "Schliesslich erzwang die Gemeinde doch eine Abrechnung; aber sie geschah bereits durch ein grosses Ausnahmegericht von 300 Standesgenossen." Cf. the *boulé* of the partisans of Isagoras which Cleomenes tried to establish in a later attack on the Alcmaeonidae at Athens (Herodotus v. 72). It also consisted of three hundred members. Cf. Sandys, *Aristotle's Constitution of Athens*, p. 1.

300 representatives of the Eupatrid clans (*ἀριστινδὴν αἰπεθέυτες*) may be said to have been an enlarged and extraordinary commission of Ephetae appointed to try the accomplices of Kylon or their slayers."<sup>1</sup> The Areopagus could hardly have been large enough to make up such a court even if it were included entire, and Vinogradoff's statement can be true only in the sense that to certain representatives of the Areopagus were added other eupatrids to bring the number up to three hundred.

The earliest mention of the ephetae occurs in the homicide laws of Draco. Both this document and the amnesty law of Solon<sup>2</sup> show that the distinction between different kinds of homicide was drawn and that the five courts existed at least as early as Draco's time, for the purpose of dealing with the different types of homicide. Pollux<sup>3</sup> attributes the institution of the ephetae to Draco; but because Draco was the first to codify the laws, much was attributed to him which undoubtedly corresponds with earlier practice. This was probably the case with the ephetae. Their antiquity is attested by the archaic nature of the courts in which they sat. The desirability of recognizing extenuating circumstances and of differentiating the various types of homicide was in all probability a motive for state intervention. Religion was another factor which led to the intervention of the state. As soon as the idea was conceived that homicide involved pollution, the slayer was regarded as a public menace and society took measures to rid itself of his presence, provided the family refused to act.<sup>4</sup> The development was possibly as follows: homicides who had slain unintentionally or who felt that their acts were justifiable began to resort to temples for refuge or purification and claimed protection on these grounds; but as litigation and political activity increased, it

<sup>1</sup> *Op. cit.*, p. 181.

<sup>2</sup> Plutarch *Solon*, xix, quoted *infra*, p. 105.

<sup>3</sup> Pollux viii. 125.

<sup>4</sup> Cf. *supra*, pp. 53 ff. Cf. Glotz, *Solidarität*, pp. 227 ff.; Gilbert, *Beiträge*, pp. 508 ff. Treston, *op. cit.*, p. 263, connects the institution of the various Athenian homicide courts with the synoecism of Attica. Cf. Myres, *op. cit.*, p. 108, who attributes state control in homicide to the development of the *polis*.



was not convenient to assemble the whole senate for each one of these cases. So while the whole body sat on the most important homicide cases—that is, murder—they drafted sections from their own number to deal with the less important cases.<sup>1</sup> It would be natural to try the suppliants on the spot. Hence the committee would try the case where the suppliant had taken refuge. This is obviously what Photius means when he describes the ephetae as *ἄνδρες οἵτινες περιὸντες ἐδίκασον*.<sup>2</sup> Just as in later times each heliastic court represented the whole body of dicasts, so the ephetae represented the Areopagus. A passage from Photius describing the ephetae as *ἄριστα βεβιωκέναι ὑπόληψιν ἔχοντες* supports this view. As members of the Areopagus they would be ex-archons, and as such would have passed a successful *dokimasia* and audit before their admission. Therefore the description may be accepted as it stands rather than as a perversion of Pollux' *ἀριστινδην*, as it is usually understood.<sup>3</sup>

The chief evidence for the functioning of the Prytaneum—the fifth homicide court—in pre-Solonian Athens occurs in the so-called "amnesty law" which was passed prior to the introduction of Solon's reforms. From the text of the amnesty law which was re-enacted after the battle of Aegospotami in 405 B.C., as it appears in the decree of Patrocleides, and from the Solonian amnesty law, as it is found in Plutarch, it is possible to determine with reasonable certainty the original text of the law. The decree of Patrocleides contains the following provision:

πλήν ὅποσα ἐν στήλαις γέγραπται τῶν μὴ ἐνθάδε μεινάντων, ἢ ἐξ Ἀρείου πάγου ἢ τῶν ἐφετῶν ἢ ἐκ Πρυτανείου ἢ Δελφινίου ἐδικάσθη ἢ ὑπὸ τῶν βασιλέων, ἢ ἐπὶ φόνῳ τίς ἐστι φυγὴ ἢ θάνατος κατεγνώσθη ἢ σφαγεύσιν ἢ τυράννοις.<sup>4</sup>

This law is expressly said to be a replica of the amnesty law which was passed on the eve of the Persian War. The latter

<sup>1</sup> There could be different sections, but not concurrent sessions, since the presence of the *archon basileus* was required at each session of each of these courts.

<sup>2</sup> *S.v. ἐφέται*. The passage is thus quite intelligible and there is no need to emend *περιὸντες* to *π' ὄντες*, in accordance with Zonaras' account of the number. Cf. *supra*, p. 98.

<sup>3</sup> Cf. Meyer, *Geschichte des Altertums*, II, 579.

<sup>4</sup> Andocides i. 78.

was undoubtedly a repetition of the Solonian law. Plutarch's version of the Solonian law is as follows:

ἐπιτίμους εἶναι πλὴν ὅσοι ἐξ Ἀρείου πάγου ἢ ὅσοι ἐκ τῶν ἐφετῶν ἢ ἐκ πρυτανείου καταδικασθέντες ὑπὸ τῶν βασιλέων ἐπὶ φόνῳ ἢ σφαγαῖσιν ἢ ἐπὶ τυραννίδι ἔφευγον ὅτε ὁ θεσμός ἐφάνη ὅδε.<sup>1</sup>

The three laws were substantially the same. The following may be suggested as the correct text of the provision in question:

πλὴν ὅποσα ἐν στήλαις γέγραπται τῶν μὴ ἐνθάδε μεινάντων, ἢ ἐξ Ἀρείου πάγου ἢ τῶν ἐφετῶν ἢ ἐκ πρυτανείου ἐδικάσθη ὑπὸ τῶν βασιλέων, ἢ ἐπὶ φόνῳ τίς ἐστι φυγὴ ἢ θάνατος κατεγνώσθη ἢ σφαγεύσιν ἢ τυράννοισι.<sup>2</sup>

It may be translated:

Except whatever names have been written on stelae of those who have not remained here or those upon whom sentence has been passed by the Areopagus or the Ephetae or the Prytaneum under the chairmanship of the kings, that is to say, if a verdict of exile or death has been rendered for murder, manslaughter or tyranny.

There is obviously reference to the Areopagus acting as a murder court,<sup>3</sup> while the phrase ἐκ τῶν ἐφετῶν refers to the three courts—the Palladium, the Delphinium, and in Phreatto in which the judges were the fifty-one ephetae. In the time of Andocides the words could not have been understood otherwise. The chief problem in interpreting the law lies in determining the functions and composition of the court called

<sup>1</sup> *Solon*, xix. It is in accordance with the practice of ancient writers not to quote a document verbatim, but to give the substance of it in language which conforms to their own style. Plutarch is no exception to this rule. Cf. Flickinger, *Plutarch as a Source of Information on the Greek Theatre*, pp. 10 ff. It is probable, then, that the passage in Andocides is an actual quotation of the law, while the words of Plutarch, as appears from the context, are in the nature of an exegetical paraphrase rather than a reproduction of the exact text of the law.

<sup>2</sup> For the reasons for the departures from the text of Andocides, cf. Gertrude Smith, "The Prytaneum in the Athenian Amnesty Law," *Class. Philol.*, XVI, 346 ff. ἢ Δελφινίου, being included in τῶν ἐφετῶν, is undoubtedly a gloss and should therefore be omitted, while the ἢ preceding ὑπὸ was probably occasioned by the rough breathing.

<sup>3</sup> It has been shown, *supra*, p. 88, that the Areopagus was functioning all through the pre-Solonian period. Plutarch's statement that no Areopagus existed before Solon's time occasioned much of the discussion about that body. For the question as to whether Plutarch had read the *Ath. Pol.*, compare G. H. Stevenson, "Ancient Historians and Their Sources," *Jour. Philol.*, XXXV, 219 ff.

Prytaneum. Three theories have been advanced. The first is based mainly on the order of words. The first offenses (*φόνος* and *σφαγή*) were naturally assigned to the first-named judicial bodies, the Areopagus and the ephetae. The Prytaneum alone, then, is left as the tribunal which dealt with tyrants. The statement of Herodotus<sup>1</sup> that at the time of the Cylonian rebellion the prytaneis of the naucraries were in charge of affairs at Athens has given rise to the view that the Prytaneum court was composed of these prytaneis, who exercised judicial functions in the extraordinary case of a revolution, although they were ordinarily an administrative body. Meyer is the most vigorous exponent of this theory.

Freilich stand ihnen [the Areopagites] als Gegengewicht der Rath im Prytaneion gegenüber, der aus den Vorstehern der 48 Naukrarien, der Unterabtheilungen der Phylen, mit den Phylenkönigen an der Spitze, gebildet war. Ihm präsidirte, wie es scheint, in der Regel der Archon, der im Prytaneion sein Amtssitz hatte (Arist. *Ath. Pol.* iii. 5), bei Gerichtssitzungen aber der König.<sup>2</sup>

He regards this council as identical with the prytaneis mentioned by Herodotus and also with the court of the Prytaneum mentioned in the amnesty law. But, even if Herodotus' statement is accepted, there is no evidence that the prytaneis of the naucraries acted as a judicial body. The adherents of Cylon were to have undergone trial, but there is not the slightest evidence that Herodotus meant that the prytaneis of the naucraries were to act as their judges.<sup>3</sup>

Another group of scholars likewise hold that cases of treason came before a court at the Prytaneum. But this court they maintain to have been composed of the nine archons. Lipsius insists that the nine archons would form a natural body for dealing with political offenses.<sup>4</sup> In his opinion it

<sup>1</sup> Herodotus v. 71.

<sup>2</sup> *Geschichte des Altertums*, II, 354 ff. Cf. Schöll, "Die Speisung im Prytaneion zu Athen," *Hermes*, VI, 21; Müller, *Eumenides*, p. 157, n. 13. Gilbert, *Constitutional Antiquities*, p. 123, n. 2 (cf. p. 125), identifies the judges of the Prytaneum court with the prytaneis or standing committee of Draco's new council.

<sup>3</sup> For the discussion of the naucraroi and the correctness of Herodotus' statement, cf. *infra*, p. 129 ff.

<sup>4</sup> *Op. cit.*, p. 24. Cf. Philippi, *op. cit.*, pp. 217 ff., and Lange, *op. cit.*, pp. 223 ff.

was probably not an extraordinary, but a permanent, court. There is no evidence, however, that the archons acted in a body as a court on any occasion. Thucydides' language in describing the affair of Cylon does not imply any trial at all.

ἀναστήσαντες δὲ αὐτοὺς οἱ τῶν Ἀθηναίων ἐπιτετραμμένοι τὴν φυλακὴν, ὡς ἑώρων ἀποθνήσκοντας ἐν τῷ ἱερῷ, ἐφ' ᾧ μὴδὲν κακὸν ποιήσουσιν, ἀπαγρόντες ἀπέκτειναν· καθεζομένους δὲ τινὰς καὶ ἐπὶ τῶν σεμνῶν θεῶν τοῖς βωμοῖς ἐν τῇ παρόδῳ ἀπεχρήσαντο.<sup>1</sup>

Busolt advanced the theory that the Prytaneum here mentioned was composed, as in later times, of the king archon and the phylobasileis, but that in early times this court was an important state court which tried serious political cases, including attempts at tyranny. He explains the reappearance of the reference to this function of the court in the decree of Patrocleides as merely a formal repetition, inasmuch as at that time (404 B.C.) such cases came before the popular assembly or before a popular court.<sup>2</sup> Only in the pre-Solonian period did it have such extensive powers, while by the fourth century it had become a sham court (*Scheingericht*). Busolt is undoubtedly correct in maintaining that the Prytaneum of the amnesty law is the court which in the time of Aristotle sat in judgment on unknown murderers, animals, and inanimate objects which had caused the death of human beings.<sup>3</sup> There is no trace of a court called Prytaneum other than this court of the phylobasileis and the king archon. Busolt is also correct in supposing that, although in historical times it had become a purely ceremonial court, concerned only with homicide, yet originally it had been an important state court.<sup>4</sup> The diminution in its powers antedates the legislation of Draco, its important functions having been turned over to the Areopagus. That the law of Solon should refer back to the distant period when this court was prominent seems quite unlikely. Furthermore, homicide is the chief topic of the passage under discussion.

Of the five Athenian homicide courts, four are mentioned

<sup>1</sup> i. 126.

<sup>2</sup> *Staatskunde*, p. 793.

<sup>3</sup> Cf. Lelyveld, *De infamia iure Attico commentatio*, pp. 57 ff.; Verdam, *De senatu Areopagitico*, pp. 18 ff.

<sup>4</sup> Cf. *supra*, p. 64, and *infra*, p. 117.

in the amnesty law either directly or by implication—the Areopagus and the three ephetic courts. In this context the Prytaneum must be the fifth homicide court. No legislator subsequent to Draco would, in a list of homicide courts, mention the Prytaneum, meaning some other court of the same name but different functions and possibly a different personnel, without distinguishing it specifically from the homicide court. Furthermore, the Prytaneum could not reasonably be omitted from a provision which excluded all homicides from the benefits of the amnesty, for it dealt with unknown murderers who constituted a not unimportant category of homicides.

No more serious political crime could be committed in a Greek community than an attempt to establish a tyranny. The Cylon incident shows, if proof is required, that the Athenians had the normal Greek attitude toward subverters of the government. It is futile to imagine that such a crime could be dealt with by any but the most authoritative body in the city. According to Aristotle, in the early period this body was the Areopagus:

The Council of the Areopagus had as its constitutionally assigned duty the protection of the laws; but in point of fact it administered the greater and most important part of the government, and inflicted personal punishments and fines summarily upon all who misbehaved themselves.<sup>1</sup>

Apparently, all criminal matters were in the hands of the Areopagus. Aristotle says that the Areopagus in the time of Solon dealt with those who tried to overthrow the government:

Solon assigned to the Areopagus the duty of superintending the laws so that it continued as before to be the guardian of the constitution in general. It kept watch over the citizens in all the most important matters and corrected offenders, having full power to inflict either fines or personal punishment. The money received in fines it brought up into the Acropolis without assigning the reason for the punishment. It also tried those who conspired for the overthrow of the state, Solon having enacted a process of impeachment to deal with such offenders.<sup>2</sup>

<sup>1</sup> *Ath. Pol.* iii. 6 (Kenyon's translation). The passage refers to the period before the time of Draco.

<sup>2</sup> *Ibid.*, viii. 4.

In 462 B.C., according to the account given by Aristotle, Themistocles expected to be tried for treason before the Areopagus.<sup>1</sup> This expectation furnished the motive for his participation in the overthrow of the power of the Areopagus.<sup>2</sup> After the Battle of Chaeronea the Areopagus arrested and put to death (λαβοῦσα ἀπέκτεινε) political wrongdoers.<sup>3</sup> If, then, as seems beyond question, the Areopagus dealt with subverters of the established order, there is no need to posit a court at the Prytaneum other than the homicide court. Would-be tyrants were tried by the Areopagus.<sup>4</sup>

Several theories have been advanced with regard to the identity of "the kings." Some scholars have construed the phrase ὑπὸ τῶν βασιλέων solely with ἐκ πρυτανείου and hold that it has no reference to the other courts named.<sup>5</sup> According to this interpretation, the reference is to the king archon and the phylobasileis who composed the ceremonial court of the Prytaneum.<sup>6</sup> Justification for this view is found in the language of the homicide laws of Draco, where τοὺς βασιλέας refers to the king archon and the phylobasileis in activities outside the Prytaneum court.<sup>7</sup>

The amnesty law, then, specifies those wrongdoers who

<sup>1</sup> *Ibid.*, xxv.

<sup>2</sup> Compare the reference to this story in the argument to the *Areopagiticus* of Isocrates in the Didot edition of the *Oratores Attici*, II. 484.

<sup>3</sup> Lycurgus *Con. Leocratem*, 52.

<sup>4</sup> Vinogradoff, *op. cit.*, p. 181: "The duty of prosecuting persons conspiring to obtain tyranny was entrusted to the Areiopagus by the decree of Patrocleides in 405 B.C." He says that the presiding judge in such trials was the king archon.

<sup>5</sup> Cf. Verdam, *op. cit.*

<sup>6</sup> *Ath. Pol.*, lvii. Sauppe offers a very curious explanation of the kings. The phylobasileis must be understood, who had jurisdiction over involuntary homicide. This crime was judged in the Palladium. Therefore, since no mention is made of the Palladium either in the law of Solon or in the decree of 404 B.C., the phrase must refer to the Palladium, and the following words, ἐπὶ φόνοφ τις ἐστι φυγή, apply to involuntary homicide. In order to make this explanation plausible, Sauppe retains ἡ before ὑπὸ τῶν βασιλέων and deletes ἡ before ἐπὶ φόνοφ. The remainder of the decree refers to decisions made by the heliastic courts concerning civil strife and would-be tyrants. *Symbolae ad emendandos oratores atticos additae sunt* (Göttingen, 1874).

<sup>7</sup> Cf. *infra*, p. 118. In the Draconian code the reference to the group is to its capacity as an advisory body in the investigation preliminary to a homicide trial.

are to be excluded from reinstatement because they have been exiled by any one of the five homicide courts for homicide or by the Areopagus for an attempt on the government. The Areopagus is thus mentioned in two capacities, as a homicide tribunal and as the court before which a grave political offense was tried.<sup>1</sup>

The situation with regard to the homicide courts in pre-Solonian Athens may then be summarized as follows: At the Areopagus were heard trials for murder and also, in later times at least, for malicious wounding and for arson.<sup>2</sup> The fifty-one ephetai sat in the Palladium, which tried unpremeditated homicide; in the Delphinium, where cases of justifiable homicide were tried; and in Phreatto, a court which sat to try for premeditated homicide men who were already in exile for unpremeditated homicide. The fifth homicide court, the Prytaneum, dealt with unknown murderers, animals, and inanimate objects which had caused the death of human beings. This ceremonial court was composed of the king archon and the phylobasileis.<sup>3</sup>

The laws of Draco dealing with homicide constitute the main source of our information regarding practice and procedure in Athenian homicide courts during, and previous to, the time of Draco. Practically nothing is known about Dra-

<sup>1</sup> Stahl, *Rhein. Mus.*, XLVI (1891), 250, 481, contended that the Areopagites judged cases of tyranny, but for this purpose sat in the Prytaneum. Verdam, *op. cit.*, took exception to this view and saw in the mention of the Areopagus merely a court which sat at the Areopagus for the trial of a political offense. In his opinion there is no reference to the Areopagus as a murder court.

<sup>2</sup> Aristotle *Ath. Pol.*, lvii; Pollux viii. 117-20.

<sup>3</sup> Ancient writers attempted to date the institution of these various courts. Pausanias (i. 28. 8 ff.) places the institution of the Palladium at the time of the return of the Trojan heroes from Troy, the institution of the Delphinium at the time of Theseus in connection with the slaying of Pallas and his sons, the institution of the court in Phreatto to the time when Teucer defended himself against the charge of slaying Ajax, and the Prytaneum he regards as originating in the ceremonial act of judging the ax which was used to slay the bull at the altar of Zeus Polieus. In vi. 11. 6, however, Pausanias, in describing the action taken by the Thasians against the statue of Theagenes which fell on a man with fatal results, seems to attribute the institution of the Prytaneum to Draco, who in his homicide laws made the provision that an inanimate object which caused the death of a person should be cast beyond the borders. Pausanias doubtless realized that Draco was putting an existing practice into writing.

co's laws except those concerning homicide. This is due to the fact that, although Draco made a complete code which was in use until the reforms of Solon, Solon repealed all but the homicide laws.<sup>1</sup> These continued in use and were revised and republished in 409-408 B.C. Owing to their close connection with religion and the well-known religious conservatism of the Athenians, it is fairly certain that only such modifications were made as were necessary to adapt them to the changed judicial system. The inscription is badly mutilated; but with the aid of passages from Demosthenes<sup>2</sup> a tolerably certain restoration of the major part of the inscription has been achieved.<sup>3</sup> The sections of the code dealing with unpremeditated and justifiable homicide, as restored, are so complete that the procedure can be followed from accusation to verdict.

Draco, to a large measure, was simply reducing to writing the practices that prevailed in Athens in his own time.<sup>4</sup> This is shown by the omission from his code of certain essential matters. For example, he fails to indicate the nature and purpose of the oath taken by the relatives of the deceased when they started the prosecution. This oath must already have been in use.<sup>5</sup> His omission of the formula of the inter-

<sup>1</sup> Aristotle, *Ath. Pol.* vii. 1. Cauer in 1889 ("Über die Gesetzgebung Drakons" *Verhandl. der 40. Philol. Vers. zu Götting* [1890]) limited Draco's work to the homicide laws. Linforth, *Solon the Athenian*, p. 276, follows this theory. Some scholars, on the other hand, consider Draco a wholly legendary name to which the work of the thesmothetae was attached. Garofalo, *Les Nόμοι de Dracon*. Cf. Glotz, *Solidarité*, p. 301, n. 2.

<sup>2</sup> xxiii. 28, 37, 44, 51, 53, 60; xliii. 57.

<sup>3</sup> *CIA* i. 61; Dareste, Haussoullier, Reinach, *Recueil des inscriptions juridiques grecques*, II (No. 21), 1; Michel, *Recueil*, No. 78; Dittenberger, *Sylloge*, No. 52; Roberts-Gardner, *Introduction to Greek Epigraphy*, II, 25; Köhler, *Hermes*, II, p. 27; Philippi, *Jahrb. f. Phil.*, CV, 577; *Der Areopag und die Epheten*, pp. 333 ff.; Hicks and Hill, *Greek Historical Inscriptions*, No. 78; Bergk *Philologus*, XXXII, 669; Ziehen, *Rhein. Mus.*, LIV, pp. 321 ff.; Ledl, *Wiener Studien*, XXXIII, 1 ff. Cf. Treston, *op. cit.*, pp. 192 ff. For a discussion of the laws of Draco, cf. Busolt-Swoboda, *Staatskunde*, pp. 805 ff.

<sup>4</sup> Busolt-Swoboda, *Staatskunde*, p. 808, point out that although the work of Draco depends on older practices, yet it shows a great development over the Homeric period.

<sup>5</sup> *CIA* i. 61. 16 ff. The words τὸν ὅρκον are used as if it were a familiar oath.



dict to be pronounced against an alleged murderer shows that the interdict was already known and used.<sup>1</sup> Similarly his failure to mention the participation of the king archon in the interdict is further evidence to the same effect.<sup>2</sup>

The text of the document with restorations is as follows:<sup>3</sup>

Διώγν[ε]τος Φρεάρριος ἐγραμμάτε[υε  
Διοκλῆς ἔρχε

- Ἔδοχσεν τῷ βουλῇ καὶ τῷ δέμο[ι]· Ἀκα[μ]αντ[ι]ς ἐπρυτάν[ευε,  
[Δι]ό[γ]-  
νετος ἐγραμμάτευε, Εὐθύδικο[ς] ἐπεσ[τά]τε, [Χσ]ε[νοφ]άνες ε[ἰ]πε· [τ]ὸν  
5 Δράκοντος νόμον τὸμ περὶ τῷ φ[όν]ο ἀν[α]γρα[φ]σά[ν]τ[ον] οἱ ἀ[ν]-  
γρ[α]φῆ-  
ς τὸν νόμον, παραλαβόντες παρὰ τῷ [βασιλέος μετὰ τῷ γραμμ]ατέο-  
ς<sup>4</sup> τῆς βουλῆς ἐστέλει λιθίνει κα[ὶ] κ[α]τ[α]θ[έ]ν[τ]ον πρόσθεν τ[ῆ]ς στο-  
ᾶς τῆς βασιλείας, οἱ δὲ πολεται ἀ[π]ομ[ισθοσάν]τον κατὰ τὸν νόμο-  
ν, οἱ δὲ ἔλλενοταμῖαι δόντον τὸ ἀργύριον.
- 10 Πρῶτος ἄχσον·  
Καὶ ἑὰμ [μ'] ἐκ [π]ρονο[ί]ας κ[α]τ[έ]νει τις τινα, φεύγειν, δ[ι]-  
κάσεν δὲ τὸς βασιλέας αἰτ[ι]ᾶ[ν] φό[νο]ν ἢ [ἐ]άν τις αἰτιᾶται ἡὸς<sup>5</sup> βου[λ]-  
εύσαντα, τὸς δ[έ] ἐφέτας διαγν[ῶ]ναι· Αἰδέσασθαι δ' ἑὰμ μὲν πατέρ[ι] ἢ  
ἢ ἀδελφ[ῶ]ς ἢ ἡυῆς, χάπα[ν]τας, ἢ τὸν κ[ο]ιλίοντα κρατῆν· ἐὰν δὲ μὲ  
hoῦ-  
15 τοι δσ[ι], μ[ε]λέ[χ]ρ' ἀ[ν]εφ[σι]ότ[ε]τος κ[αὶ] ἀνεφσιῶ, ἐὰν χάπαντες  
αἰδέσα]σ-  
θαι ἐθέλοσ[ι], τὸν ἡό[ρκ]ον ὁμόσαντας· ἐὰν δὲ τοῦτον μεδ' ἡῆς ἔι, κτε-

<sup>1</sup> *Ibid.*, ll. 20 ff. It is, of course, possible that there was no standardized formula for the interdict. Cf. Demosthenes, xx. 158; Pollux viii. 66.

<sup>2</sup> *Ibid.*, ll. 20 ff. Aristotle says expressly that the king archon made the proclamation (*Ath. Pol.* lvii. 2; cf. Pollux viii. 90). In view of the conservative character of procedure in homicide courts it is likely that Aristotle is right for the early period also.

<sup>3</sup> The text is given here according to Dareste, *op. cit.* This text is followed in general by Dittenberger, *op. cit.*

<sup>4</sup> Dittenberger in his third edition reads here: παρὰ τῷ κατὰ πρυτανείαν γραμματέος, following Köhler.

<sup>5</sup> Treston reads μὴ βουλεύσαντα and translates the first three lines of the passage: "And if a man slays a man not with intent to kill, let him be put on trial (φεύγειν), and let the 'Kings' judge of the causes of death, or, if anyone accuses a person of slaying without deliberation (μὴ βουλεύσαντα), let the Ephetae adjudicate." The first part of the sentence then refers to accidental killing in which there was no guilt attaching to the human agent, but in which it was necessary to prove that an animal or inanimate object had caused the death. The second part refers to manslaughter (*op. cit.*, pp. 195 ff.).

- νει δὲ ἄκο[ν], γ[ν]ῶσ[ι] δ' ἐ[σ]τ[ι]ν οἱ πέν]τ[έκοντα καὶ ἡς οἱ ἐφέται ἄκοντα  
 κτέναι, ἐσέσθ[ο]ν δέ[κα οἱ φράτερες ἐὰν ἐθέλουσιν· τοῦτος δ' ἐ[σ]τ[ι]ν  
 20 πέντεκο[ν]τ[α καὶ] ἡς ἀρ[ι]σ[τίνδεν] hairéssthn· Καὶ οἱ πρό]τε[ρ-  
 ον κτέν]α[ντες ἐν τ]ῷ[δε τῷ θεσμῷ ἐνεχέσθον· Προεῖπέν δὲ τῷ κ-  
 τέ[ναντι ἐν ἀ]γορ[ᾷ, ἐν τ]ῷ[δε τῷ θεσμῷ ἐνεχέσθον· Προεῖπέν δὲ τῷ κ-  
 δέ [καὶ ἀνε]ψ[φισ]ίος καὶ ἀνεψιὸν παῖδας καὶ γαμβρὸς καὶ πενθερὸς [κ-  
 αι φ[ρά]τ[ε]ρ[ας] . . . . . τὸς πεκτέκοντα κα]ί  
 25 ἥνα . . . . . ἥον ἂν φ]όνο  
 ἡ[λ]ῶσ[ι] . . . . . Ἐὰν δὲ τις] τ-  
 ὁ[ν ἀνδροφόνον κτένει] ἔ[στι]ν αἴτιος ἐ[στ]ὶν φόνο, ἀπεχόμενον ἀγορᾶς ἐφ]ο-  
 ρί[α]ς [καὶ ἄθλον καὶ ἱερὸν ἀμφικτυονικόν, ὡς περ τὸν Ἀθηνᾶ]ιον [κ-  
 [τέναντα ἐν τοῖς αὐτοῖς ἐνεχέσθαι· διαγιγνώσκεν δὲ τὸς ἐφ]έτα[ς].  
 30 Τὸς δὲ ἀνδροφόνους ἐχσεῖναι ἀποκτένεν καὶ ἀπάγεν ἐν] τῇ[ι] ἐμε[δ-  
 [απεῖ, λυμᾶνεσθαι δὲ μέ, μεδ' ἀποιναῖν, ἔ διπλὸν ὀφέλεν ὅσ]ο[ν ἂν κ-  
 [αταβλάσσει] . . . . . Ἐὰν δὲ τις ἄρξαντ]α χε[ρ-  
 ὁ[ν ἀδίκον κτένει] . . . . . ἔαν] ἀέκον κ-  
 35 τέ[ναι, δικάζεν δὲ τὸς βασιλέας αἰτιῶν φόνο, διαγνῶναι δ' ἐ] τὸς ἐ-  
 [φέτας· Καὶ κατὰ ταῖτα φόνο δίκας εἶναι δῶλον κτέναντι] ἔ[στι]ν ἐλείθ-  
 ε[ρ]ο[ν]. Ἐὰν δὲ τις φέροντα ἔ[στι]ν ἄγοντα βίαι ἀδίκος εἰθὺς ἀμυν]όμενο-  
 ς κτ[ένει, νεποίνει τεθνάναι].  
 . . . . .  
 47 . . . . . ἡὸς ἂν . . . . . ἔ μετ]α[π]ο[ε]-  
 48 σει] . . . . .

*"Diognetus of Phrearrhus was secretary*

*"Diocles was archon*

"The resolution of the senate and the assembly. The tribe Aca-  
 mantis was the prytanizing tribe, Diognetus was secretary, Euthydi-  
 5 cus was chairman, Xenophanes made the motion. Let the commis-  
 sioners obtain the law of Draco regarding homicide from the king  
 and the secretary of the Boulé and publish it on a stone stele. Let  
 them set up the stele before the King's Portico. Let the Poletae hire  
 the work done according to law and let the Hellenotamiae furnish  
 the money.

10 "First axon.

"If anyone kills a man without premeditation or if anyone is  
 charged with plotting homicide, he shall be exiled, the kings shall decide  
 the nature of the homicide and the ephetae shall give the verdict.

"If there is a father or a brother or sons let them grant pardon to  
 the homicide, if all agree. Otherwise the one who opposes it shall  
 15 prevent the pardon. But if there are no such relatives, then let the  
 relatives up to and including the first cousins exercise the right of

pardon, if all are willing to pardon, after taking the oath. But if there is none of these and the man committed homicide without premeditation and the Fifty-one, i.e. the Ephetae, have decided that he slew without premeditation, let ten phratry members admit him to the country if they are willing. And let the Fifty-one choose these phratry members on the basis of birth. And let those who slew before this law was enacted be liable under this law.

"The relatives up to and including first cousins shall pronounce the interdict against the homicide in the agora.

"And the cousins and the children of cousins and the sons-in-law and the fathers-in-law and phratry members shall join in the prosecution.

"If anyone slays a homicide or is responsible for his death while he keeps away from border markets and games and Amphictyonic rites he shall be liable to the same punishment as the one who kills an Athenian. The ephetae shall give the verdict. It shall be permitted to slay homicides and also to hale them into court in their own land, but not to abuse them or to extort blackmail. The punishment for such an offense shall be double the damages.

"If one slays another who is the aggressor (i.e. in a quarrel) . . . . if the slaying is unpremeditated, the kings shall decide the nature of the homicide and the ephetae shall render the verdict. The same procedure shall be followed whether a slave is killed or a free man.

"If a man while defending himself kills another on the spot who is unjustly and forcibly carrying off his property there shall be no punishment for the slaying."

The first step in a trial for unpremeditated homicide was a public proclamation in the agora forbidding the accused to frequent the market place and temples. The purpose of this interdict was to protect from pollution all public places and all religious ceremonies. The proclamation was made by the king archon at the instance of a near relative of the deceased. The code makes no mention of the king archon in this connection, but Aristotle says expressly that in his time the king archon made the proclamation.<sup>1</sup> In view of the conservative character of the procedure in the homicide courts, it is quite likely that Aristotle is right even for the earlier period. The

<sup>1</sup> *Ath. Pol.* lvii. 2: καὶ ὁ προαγορεύων εἰργεσθαι τῶν νομίμων οὗτος (ὁ βασιλεὺς) ἐστίν. Pollux viii. 90, doubtless drew his account from Aristotle: προαγορεύει (ὁ βασιλεὺς) δὲ τοῖς ἐν αἰτίᾳ ἀπέχεσθαι μυστηρίων καὶ τῶν ἄλλων νομίμων. Philippi, who wrote before the discovery of Aristotle's treatise, rejects the statement of Pollux, explaining it on the ground that the relatives could make the proclamation only on the order of the king archon after they had laid the charge before him.

silence of the code on the subject is to be explained by the fact that the king archon in pre-Draconian times was in the habit of making this and similar proclamations regarding polluted persons.<sup>1</sup> The interdict was omitted because, no doubt, it was an ancient and well-known formula. Its general purport is found in several passages.<sup>2</sup>

The exact degree of relationship of those who were permitted to initiate proceedings has been a matter of some dispute: προειπέν δὲ τῷ κτέναντι ἐν ἀγορᾷ ἐντὸς ἀνεφσιώτετος καὶ ἀνεφσιῶ.<sup>3</sup> But the interpretation of Lipsius seems the most plausible. On the basis of a passage of Demosthenes, ἐὰν δὲ μηδετέρωθεν ἢ ἐντὸς τούτων,<sup>4</sup> he asserts that ἐντὸς may mean "up to and including." ἐντὸς in this case is equivalent to μέχρι in the phrase preceding: ἐὰν δὲ μὴ ὥσι πρὸς πατρὸς μέχρι ἀνεψιῶν παίδων. Wyse has conclusively shown that μέχρι may, and sometimes must, mean "up to and including."<sup>5</sup> Those who participated in the accusation, then, were father, brother, son, the children of brothers and sisters, uncles, and first cousins. The addition of the concrete ἀνεφσιῶ after ἀνεφσιώτετος is intended to restrict definitely the meaning of the abstract ἀνεφσιότης, which might easily be understood in a wider sense than the relationship of first cousin. While participation in the initial accusation was narrowly restricted, all relatives, and even members of the phratry, joined freely in the prosecution: συνδιόκεν δὲ καὶ ἀνεφσιῶς καὶ ἀνεφσιῶν παῖδας καὶ γαμβρὸς καὶ πενθερὸς καὶ φράτερας.

The interdict was followed by the preliminary investigation in which "the kings"<sup>6</sup> decided *prima facie* on the kind

<sup>1</sup> *Supra*, p. 111.

<sup>2</sup> Demosthenes xx. 158: χερνίβος εἰργεσθαι τὸν ἀνδροφόνον, σπονδῶν, κρατήρων, λερῶν, ἀγορᾶς. Cf. Pollux viii. 66.

<sup>3</sup> 20 ff.

<sup>4</sup> xliii. 51. Lipsius, *op. cit.*, p. 557; *Jahresbericht über die Fortschritte der klassischen Altertumswissenschaft*, XV, 291.

<sup>5</sup> *The Speeches of Isaeus*, pp. 566 ff. Philippi contends that ἐντὸς can mean only "within the circle of" or "up to and not including" and that the second of these two meanings must be accepted for this passage (*Der Areopag.*, pp. 70 ff.). Cf. Busolt, *Geschichte*, II, 230; Dareste, *op. cit.*, p. 15; De Sanctis, *op. cit.*, p. 181.

<sup>6</sup> By "the kings" are to be understood the king archon and the phylobasileis. Cf. *infra*, p. 117.

of homicide which had been committed, thus determining before which court the trial should take place: *δικάζεν δὲ τὸς βασιλέας αἰτιῶν φόνο*.<sup>1</sup> It is known that in later times three investigations were made in three successive months and that the case was finally tried on the last three days of the fourth month.<sup>2</sup> In the fifth and fourth centuries the preliminary investigations were called *προδικασίαι*. It was on the basis of the evidence produced at these investigations that the assignment of a case was made to a particular court. Undoubtedly the term *προδικασία* reflects the word *δικάζειν* as it is used in the present inscription. At the actual trial the fifty-one ephetae served as judges: *τὸς δὲ ἐφέτας διαγνῶναι*.

Four theories have been advanced as to the identity of the kings mentioned here: (1) all of the nine archons, or at least the first three;<sup>3</sup> (2) the phylobasileis or kings of the pre-Cleisthenean tribes;<sup>4</sup> (3) the archon basileus alone;<sup>5</sup> (4) the archon basileus and the phylobasileis combined.<sup>6</sup> Against the first of these theories it may be objected that such a designation of the archons in an official document after the institution of the annual archonship is unthinkable. If the phrase were so understood when the law was copied down for practical uses in 409-408, it would surely have been changed, for at that time the king archon presided in homicide courts and would naturally alone be thought of. Another objection to the theory is that a court of the nine archons under the presidency of the king archon is inconceivable. In such a case the archon eponymous would naturally have held the presidency. The second of the four theories is negligible since the king archon must have been included whether he presided alone or in conjunction with the phylobasileis. The third theory is to be rejected for linguistic rea-

<sup>1</sup> 11 f. Cf. Philippi, *op. cit.*, p. 85.

<sup>2</sup> Antiphon vi. 42; Pollux viii. 117.

<sup>3</sup> Curtius, *Berichte d. Berl. Akad.* (1873), pp. 288, 290.

<sup>4</sup> Wachsmuth, *Stadt Athen*, I, 469 ff.

<sup>5</sup> Köhler, *Rhein. Mus.*, XXIX, 8; Lange, *op. cit.*, p. 43; Philippi, *op. cit.*, pp. 233 ff.; Busolt, *Geschichte*, II, 159, n. 1; Gilbert, *Beiträge*, p. 489, n. 2.

<sup>6</sup> Schoemann, *Jahr. f. kl. Phil.*, CXI, 153 ff.; CXIII, 16 ff.; Lipsius, *Das Attische Recht*, p. 26; Treiston, *op. cit.*, pp. 195 ff.

sons, although an attempt has been made to explain the plural by referring it to "the king-archons in succession."<sup>1</sup> Scholars have been tempted to follow this view because it is expressly stated in one of the later speeches of Antiphon, whose career ended in 411 B.C., that the king archon conducted the preliminary investigation in homicide cases.<sup>2</sup> There is no reference to the phylobasileis in the passage. This is not, however, conclusive proof that the king archon acted alone. Even though the phylobasileis participated in determining the jurisdiction of the case, yet subsequently the king had to prepare the case for trial and bring it before the court. In this the king acted alone, and it is to this function that Antiphon is referring. The fourth theory, the combination of the king archon and the phylobasileis, is supported by the plural number and by the fact that there are no other kings to whom the plural number could refer. The following development may be suggested. After the unification of Attica, at least, the phylobasileis were members of the Council of Elders but, as a group, outranked the other members of the council in importance. In addition, from the time of the formation of the Ionic tribes, the phylobasileis formed an important state court, probably for the settlement of intertribal disputes. They were summoned by the king and sat under his presidency. Long before the state interfered in homicide cases generally, the court of the phylobasileis, it may be conjectured, heard homicide cases which involved members of different tribes. They are thus very early definitely connected with homicide cases. As members of the Council of Elders, it is reasonable to suppose that the king might at any time use them for consultation in regard to any business that he might wish to bring before the council. This would include all sorts of state matters and also, from time to time, various matters connected with homicide.<sup>3</sup> In this capacity the phylobasileis were an advisory committee.

<sup>1</sup> Cf. the plural βασιλῆς in Plato, *Menexenus*, 238 D, which has regularly been understood to refer to the king archons. Cf. Shorey, *Class. Philol.*, V, 361.

<sup>2</sup> vi. 42.

<sup>3</sup> Compare the Homeric trial-scene, which is connected with homicide, *supra*, p. 32.

With the coming of the idea of pollution and the interference of the state in homicide, definite courts were established for the trial of different degrees of homicide. The phylobasileis continued to act as an advisory committee in the preliminary investigation; that is, they helped to determine the nature of the homicide and consequently the proper jurisdiction for the case. The king archon, however, like his royal predecessor, brought the case before the council (the Areopagus) or before one of the newly established courts after proper preparation.

Certain types of homicide cases never came before a court. If the murderer were unknown or the death were due to an accident through the agency of an animal or an inanimate object, the case could go no farther. There could be no real trial. The phylobasileis constituted the group that determined that an object or an animal had been the cause of the death. They thereupon pronounced sentence upon the polluted animal or object and had it conveyed beyond the borders. Against the unknown murderer the interdict was pronounced. The phylobasileis under the presidency of the archon basileus came to be known in this capacity as the Prytaneum—the fifth homicide court.

Draco does not specify the place of the trial for unpremeditated homicide, but unquestionably it was the Palladium, just as it was in later times. τῶν δ' ἀκουσίων καὶ βουλεύσεως, κἂν οἰκέτην ἀποκτείνῃ τις ἢ μέτοικον ἢ ξένον οἱ ἐπὶ Παλλαδίῳ.<sup>1</sup> Banishment for an indeterminate period was the penalty. The person banished had to keep away, not only from Attica, but also from pan-Hellenic gatherings: ἀθλῶν καὶ ἱερῶν. Under certain conditions the exile could be terminated.<sup>2</sup> If the deceased had a father or a brother or a son, they might readmit the murderer to the country provided that all of these relatives agreed on the pardon. But if there were no such relatives, the circle was widened to include first cousins. Again, the consent of all was necessary to make the pardon effective. There was a further provision, namely, that the

<sup>1</sup> Aristotle *Ath. Pol.* lvii. 3; Demosthenes xxiii. 71; Harpocration, s.v. βουλεύσεως; Philippi, *op. cit.*, pp. 29 ff.

<sup>2</sup> Cf. Demosthenes xliii. 57.

relatives were required to take an oath. The nature of the oath is not specified, doubtless because it was an oath which had long been in use. It is obviously intended to substantiate the claims to relationship with the deceased,<sup>1</sup> as is shown by the fact that it was not required of the phratry members who, in case the deceased left no relatives at all, exercised the pardoning power, *αἰδεσις*.<sup>2</sup> Ten members were chosen *ἀριστίνδην* by the fifty-one ephetae for the purpose of considering a pardon. The provision with regard to the pardon of murderers is made retroactive, granting return from exile on the same terms to those convicted before the enactment of Draco's law as well as after.<sup>3</sup> So long as a convicted murderer or one accused of homicide and interdicted<sup>4</sup> remained in banishment and avoided gatherings which Athenians might be expected to frequent, he was protected from violence as was any other Athenian living abroad. Whoever killed him was liable to punishment, like any homicide, if he returned to Athenian territory. But if an exiled homicide re-entered Attica before his banishment was terminated, he was liable to be put to death.

This section of the code has caused some misapprehension. Heraldus long ago suggested that the exile could be slain only if he resisted arrest.<sup>5</sup> This suggestion was due to the conviction that civilized Athenians would not think of killing a man in cold blood without a good and sufficient reason. Thalheim<sup>6</sup> expressed surprise that, although killing

<sup>1</sup> A similar oath was in later times required of prosecutors in homicide cases, Demosthenes xlvii. 72.

<sup>2</sup> *CIA* i. 61. 16 ff. *ἐὰν δὲ τούτων μὴδ' εἰς ἥ, κτείνῃ δὲ ἄκων, γυνῶσι δὲ οἱ πενήκοντα καὶ εἰς οἱ ἐρέται ἄκοντα κτείνειν, ἐσέσθων δέκα οἱ φράτερες ἐὰν θέλωσιν*. Premeditated murder could not, of course, be pardoned even by the relatives. The penalty was death or *ἀειφυγία*.

<sup>3</sup> It is interesting to compare this with the code of Gortyn, which is never retroactive.

<sup>4</sup> Demosthenes xxiii. 29 ff. argues that *ἀνδροφόνους* in this passage means "convicted murderers" only. But this view is disproved not only by Lysias' use of the word (x. 7), but also by Demosthenes' own usage in a later section of the same speech (80). Cf. Lipsius, p. 943, n. 4.

<sup>5</sup> Kennedy, *Demosthenes, Orations*, III, 176, n. 2, cites Heraldus with approval.

<sup>6</sup> *Rechtsalterthümer*, p. 50. Maltreatment was forbidden because it might be employed to extort blackmail.



was permitted, physical abuse was forbidden. Some<sup>1</sup> have taken ἀπάγειν to mean "enslave." Others have held that the right to kill or to arrest was confined to the relatives of the murdered man. These misapprehensions are due in part to the fact that the primitive method of dealing with an outlaw by killing him on sight and the more civilized method of arrest and inquiry before execution are set forth as alternatives in the same section. Death was the penalty for unlawful return from banishment. In accordance with primitive custom, it could be exacted by anyone who cared to take the risk of killing a desperate man. Or the alleged criminal could be turned over by anyone to the proper authorities for execution after suitable inquiry into the facts. We may be sure that even in the age of Draco few citizens would prefer the first alternative. It is clearly implied in Demosthenes' discussion of the section that in the fourth century the death penalty was regularly exacted by the thesmothetae. As the offense was not the original homicide, but the unlawful return from exile, there can be no question of limiting the right of action to relatives of the victim.<sup>2</sup> Neither can there be any question of enslaving the exile, because, being a murderer, he was polluted.<sup>3</sup>

The discussion regarding the authenticity and interpretation of this section of the code has obscured one of its most significant features from the standpoint of Athenian judicial history. In permitting any citizen to slay a returning exile, Draco is no doubt incorporating in his code an ancient practice. But the alternative provision for arrest by anyone and a trial before a magistrate marks a distinct step in advance. It is intended to meet the requirements of a more enlightened age. The state now intervenes and executes the outlaw not

<sup>1</sup> Dareste, Haussoullier, Reinach, *op. cit.*, I, 18. Cf. Usteri, *Achtung und Verbannung im Attischen Recht* (1903), p. 9.

<sup>2</sup> Dareste, Haussoullier, Reinach, *op. cit.*, I, 18. This view has been generally rejected. Cf. Lipsius, *op. cit.*, p. 604; Usteri, *op. cit.*, p. 9.

<sup>3</sup> Demosthenes xxiii. 31-32, understands ἀπάγω to mean "take into custody and deliver to the authorities by the summary process known as ἀπαγωγή." Cf. Gilbert, *Constitutional Antiquities*, p. 387; Lipsius, *op. cit.*, p. 604.

for the original crime—homicide, but because, being polluted, he is a public menace. Usteri finds a different reason for state intervention. He thinks that in defying the law the exile has outraged the community. "Der zur Verbannung Verurteilte, der im Lande bleibt oder unbefugt dahin zurückkehrt, vergeht sich damit gegen die Gesetze, somit gegen die gesamte Bürgerschaft, und nicht nur gegen die Familie, die durch seinen Totschlag betroffen wurde."<sup>1</sup> But the invariable practice of excluding from amnesty<sup>2</sup> all homicides in exile supports the view that pollution is an important reason for the intervention of the state. Once the notion that the shedding of blood involved pollution became current, it was inevitable that communities should take steps to protect themselves adequately from the danger of close association with murderers. Draco's provision marks the public interest in the matter. The citizen who makes the arrest and prosecutes the culprit represents the whole community. It is an exception to the prevailing rule that only the individual wronged had the right to prosecute.

It may be objected that the citizen who thus takes an outlaw into custody is an informer rather than a prosecutor, because the exile may already have been condemned in a court of law. But the condemned murderer is guilty of a new infraction of the law in returning to Attica. Consequently the authorities must always have taken steps to satisfy themselves that the man arrested was guilty of a breach of the law. This procedure would involve proof of his identity and of the fact that he was arrested in Attic territory, in case of denial on his part. Such an inquiry, be it never so simple and informal, must be regarded as a trial. The citizen who brought the accused before a magistrate and proceeded to establish the facts was really a prosecutor representing the

<sup>1</sup> Usteri, *op. cit.*, p. 9.

<sup>2</sup> Cf. Plutarch (*Solon*, xix) for the Solonian amnesty law which was repeated on the eve of the Persian War and after the Battle of Aegospotami (Andocides i. 78.). Homicides were excluded from the benefits of the amnesty after the overthrow of the Thirty (Aristotle *Ath. Pol.* xxxix. 5.). Cf. Bonner, *Class. Philol.*, XIX, 175.

community. The action thus instituted exhibits all the essential features of a normal public action.<sup>1</sup>

There are indications that this was not the only departure in the code from the rule that the victim alone could prosecute one who had wronged him. The law forbade maltreatment or blackmail of the exile, under pain of paying double damages. The procedure was doubtless set forth in the lacuna (seventy-nine letters missing) found at this point in the inscription (l. 31). In the version of the section which is quoted by Demosthenes the provision appears as follows: εἰσφέρειν δ' ἐς τοὺς ἄρχοντας, ὧν ἕκαστοι δικασταὶ εἰσι, τῷ βουλομένῳ. τὴν δ' ἡλιαίαν διαγιγνώσκειν.<sup>2</sup> The reference to the heliaea<sup>3</sup> shows that the section is not Draconian. Neither can it belong to the Solonian code. If the provision is genuine, it must belong to a post-Cleisthenean revision. But in any event the original provision must have been substantially the same. The victim of the outrage, i.e., the original homicide, being polluted and ἄτιμος, was debarred from appearing in court to exact the penalty. Under the circumstances the most natural thing to do was to permit anyone to prosecute the case just as the Demosthenic version of the law provided. It is tempting to suggest that the famous words τῷ βουλομένῳ, κ.τ.λ., appeared in the original form of the provision; but in view of the fact that they do not appear in the first part of the section where they might have been added to ἐξεῖναι, it would be a hazardous conjecture. The effect, however, is the same. The prosecutor may represent the victim if the fine is for his benefit in the nature of damages, but he is essentially a representative of the community. The public interest in this aspect of the case is vital. By paying blackmail

<sup>1</sup> Attention was first drawn to this feature of the code of Draco by Gertrude Smith, *Class. Philol.*, XVII, 197. Steinwenter, *Gnomon*, IV, 69, remarks, "Ja das ἀπάγειν in Z 30 geht sogar über ein rein privates Verfolgungsrecht hinaus." Cf. Adcock in *CAH*, IV, 30 f.: "If the exiled homicide returns to Attica still unpardoned he may be killed or haled to judgment, but not mutilated or held to ransom." For a different view, cf. Calhoun, *Criminal Law*, p. 68, n. 42.

<sup>2</sup> Demosthenes xxiii. 28. Cf. Drerup, "Über die bei den attischen Rednern eingelegten Urkunden," *Jahrb. für class. Philo.*, XXIV, Suppl., 268.

<sup>3</sup> The institution of the heliaea was subsequent to Draco.

the exile might escape arrest indefinitely and continue to pollute the community by his presence at public gatherings.

The next portion of the code deals with justifiable homicide. The specifications in regard to the right of the relatives to accuse and prosecute are not repeated. The first case mentioned is killing in self-defense: *ἐὰν δέ τις ἄρξαντα χερὸν ἀδίκον κτείνει* (l. 33). "The kings" are to decide on the kind of homicide. The ephetae are to act as judges and decide upon the guilt of the accused in precisely the same manner as in cases of unpremeditated homicide.

The next section has been the subject of much dispute. The only remaining letters are *ε ελευθ* at the end of line 36. Köhler assumed that it dealt with the murder of a slave and restored it thus: *καὶ κατὰ ταῦτὰ φόνου δίκας εἶναι δοῦλον κτείναντι ἢ ἐλεύθερον*, i.e., the trial would be just the same as that described above. Bergk restored it as a further provision regarding justifiable homicide; and this, indeed, seems plausible, since the preceding sentence deals with that type of homicide case: *καὶ ἐὰν ἐπὶ δάμαρτι ἢ ἐπὶ παλλάκῃ, ἣν ἂν ἔχη ἐπὶ] ἐλευθέ[ρο] [ις παισι ἢ ἐπὶ μητρὶ ἢ ἐπὶ ἀδελφῇ ἢ ἐπὶ θυγατρὶ τιμω]ρούμενος κτ[είνη, τούτων ἕνεκα μὴ φεύγειν κτείναντα*. It is a provision permitting a man to kill an adulterer caught in the act.<sup>1</sup> According to this restoration, a trial would take place like the one described in Lysias' first oration in defense of a husband who claimed that he slew Eratosthenes in his wife's apartment. Dareste, however, rejects this interpretation on the ground that the letter *ε* before *ελευθ* is certain. If Köhler's restoration is accepted, a preliminary investigation to determine whether the murderer acted in self-defense must be assumed, just as in the case above an official inquiry is necessary to determine who struck the first blow and whether the homicide was justifiable. Justifiable homicide, cases were, in later practice, tried before the Delphinium; and presumably they were tried there in the time of Draco.<sup>2</sup>

The inscription in its present state contains no reference

<sup>1</sup> Cf. the Gortyn code ii. 28 ff.

<sup>2</sup> The locality was perhaps originally a matter of accident, due to the suppliant's taking refuge in a particular shrine. Cf. *supra*, p. 103.

to trials such as took place in the fifth and fourth centuries before the courts of the Prytaneum and in Phreatto. It has been suggested that the unrestorable lines at the end of the inscription contained references to the two types of case which would come before these two courts.<sup>1</sup> It has been pointed out that the space is not sufficient for such provisions. In fact, the remainder of the inscription is quite incapable of restoration except that the traces of the word μεταποίηση show that the law probably ended with the provision quoted in Demosthenes: *ὅς ἂν ἀρχῶν ἢ ιδιώτης αἴτιος ᾗ τὸν θεσμόν συγχυθῆναι τόνδε, ἢ μεταποίησιν αὐτὸν ἄτιμον εἶναι καὶ παῖδας καὶ τὰ ἐκείνου.*<sup>2</sup>

As this cursory review of the inscription shows, premeditated homicide is not mentioned, although Draco is reputed to have been the first to draw a distinction between premeditated, unpremeditated, and justifiable homicide. In this connection the introductory words of the code, as it stands, have occasioned much discussion, for they are obviously not words which would be used to begin a set of laws, *καὶ ἐὰν μή*. One explanation offered is that the laws of Draco contained a provision on premeditated homicide at the beginning. When the laws were copied, that provision was placed on a separate stele. If this theory is correct, it is necessary to assume that the popular decree, which heads the existing stele, and the axon number were repeated at the beginning of each stele, an assumption which is by no means attractive. Another theory explains the beginning on the supposition that the laws of Draco on premeditated homicide had been superseded by later legislation and hence were no longer in existence. Gilbert contends that in the original laws of Draco a single sentence preceded the present beginning. *ἐὰν ἐκ προνοίας κτείνῃ τίς τινα, ἀποθανεῖν (ἢ φεύγειν καὶ τὰ ἐκείνου ἄτιμα εἶναι).*<sup>3</sup> The remainder of the paragraph after *φεύγειν*, then, would refer to the procedure common to both kinds of homicide

<sup>1</sup> Presumably the courts of the Prytaneum and in Phreatto were conducted in much the same way as in later times. The Prytaneum was chiefly ceremonial (cf. Hyde, *Amer. Jour. of Philol.*, XXXVIII, 152 ff.). Neither of these courts can have sat very frequently.

<sup>2</sup> xxiii. 62.

<sup>3</sup> Gilbert, *Beiträge*, p. 490.

trial, i.e., the kings decide before which court the case shall go, but the ephetae constitute the membership of the court in both cases. This theory of Gilbert is due to his assumption that during the time of Draco the ephetae judged cases of premeditated homicide. But the court of the Areopagus in the time of Draco had jurisdiction in these cases.<sup>1</sup>

It is impossible to find authentic material for a reconstruction of the procedure of the Areopagus in pre-Solonian and pre-Draconian times.<sup>2</sup> Several mythical trials for homicide are represented as being held at Athens before a court which sat for the purpose of dealing with such cases. In some of these the parties involved were not Athenians. These stories seem to indicate that in very early times provision was made in Athens for the trial of persons who were charged with murder and that strangers may have been induced by its reputation to submit their cases to this court.<sup>3</sup> It is true that in the case of foreigners the verdict could not be enforced, but the question of jurisdiction is of relatively little importance where the matter is one of religion rather than of law. In all of the myths this court is known as the Areopagus.<sup>4</sup> The account of none of these trials, however, except that of Orestes, affords any data regarding practice and procedure. Aeschylus, in his description of this trial in the

<sup>1</sup> Cf. *supra*, pp. 91 ff. Treston, *op. cit.*, pp. 248 and 225, believes the law in Demosthenes xxiii. 20 about the Areopagus to be a genuine Draconian law.

<sup>2</sup> Before the Areopagus in the fifth and fourth centuries came premeditated homicide, wounding with intent, arson, and premeditated poisoning resulting in death (Demosthenes xxiii. 22; Aristotle, *Ath. Pol.* lviii. 3; Pollux viii. 117; Philippi, *op. cit.*, pp. 23 ff.). The preliminary investigation was identical with the procedure followed in cases of unpremeditated homicide. The accuser swore to his right to prosecute and to the guilt of the defendant; the defendant, in his turn, to his innocence (Antiphon v. 11; v. 16; Lysias x. 11; Demosthenes xxiii. 67). Each of the two could make two speeches, after the first of which the defendant was at liberty to go into exile (Demosthenes xxiii. 69; Pollux viii. 117). Equal votes constituted an acquittal (Antiphon v. 51). The king archon took part in the voting after he had divested himself of his magisterial character by taking off his wreath (Aristotle *Ath. Pol.* lviii. 4; Pollux viii. 90).

<sup>3</sup> Ancient writers attribute to Athens the invention of courts and trials. Cf. *supra*, p. 61.

<sup>4</sup> Hellanicus, quoted by the scholiast on Euripides, *Orestes*, 1648; *Electra*, 1258 ff.; Demosthenes xxiii. 66; Pausanias i. 28. 5; Parian Marble, *Ep.* 3; Bekker, *Anecdota*, I, 444.

*Eumenides*, represents Athena as instituting a homicide court at Athens for the purpose of trying Orestes. The common tradition in ancient times placed the scene of the trial on the Areopagus.<sup>1</sup> Aeschylus identifies the new court instituted by Athena with the Areopagus of the historical period. Some modern scholars have refused to accept the tradition, and considerable discussion about the scene of the trial has ensued;<sup>2</sup> but the problem has no place in the present study. The details given by Aeschylus are not full enough to distinguish the court which he describes from any of the other homicide courts. The proceedings begin with a preliminary investigation conducted by Athena acting as presiding officer and filling the rôle which the king archon filled in later times.<sup>3</sup> The Erinyes are questioned first. They tell their name and state their accusation against Orestes.

φονεὺς γὰρ εἶναι μητρὸς ἡξιώσατο.

Athena inquires whether there were extenuating circumstances, but the Erinyes evade the question. They object that Orestes will neither take nor tender an evidentiary oath. At this point Athena questions Orestes as to his name and story and his right to be a suppliant. Orestes replies that he is already ceremonially clean since his purification was performed in Apollo's temple at Delphi. Then he describes his act, asking Athena to judge its justifiability. Athena declares herself incapable of deciding the matter alone and determines to choose from the best of her citizens men who shall constitute a permanent tribunal for the trial of homicide.<sup>4</sup> The two parties to the suit are ordered to summon their witnesses and produce their proofs.

At the trial Athena again presides. A herald proclaims the meeting by the blast of a trumpet. While the people are

<sup>1</sup> Aeschylus *Eumenides*, 687 ff.; Euripides *Electra*, 1258 ff.; *Orestes*, 1650; *Iph. Taur.*, 961.

<sup>2</sup> Ridgeway, "The True Scene of the Second Act of the *Eumenides* of Aeschylus," *Class. Rev.*, XXI, 163 ff. Cf. Verrall, *The Eumenides of Aeschylus*, p. 184.

<sup>3</sup> *Eumenides*, 397 ff.

<sup>4</sup> Euripides *Orestes*, 1650 ff., is at variance with Aeschylus in that he makes the gods act as jurors.

assembling, Athena proposes to proclaim the establishment of the new court, but her speech is cut short by the entrance of Apollo. The trial begins, and the ordinance is postponed. Apollo testifies to the purification of Orestes at his instance and declares himself responsible for Orestes' act. Athena then opens the trial, using the regular technical formula εἰσάγω τὴν δίκην. The prosecution, represented by the Erinyes, is bidden to make the accusation. This consists in questions addressed to Orestes.<sup>1</sup> Orestes lays the guilt upon Apollo, at the same time inquiring why the Erinyes did not pursue his guilty mother. Their sole defense is that she was not of the same blood with the man she murdered. Orestes then calls upon Apollo for his evidence. The god declares that he received from Zeus the oracle directing Orestes to avenge his father. Clytemnestra deserved to die because of her own guilt. To the Erinyes' objection that Zeus himself put his own father in chains and yet, in the case of Orestes, considers the death of a father of more importance than that of a mother, Apollo replies that fetters may be unbound, but spilt blood is irrevocable. The god here enters upon the main defense, namely, that the father is the true parent. After this closing plea of the defense, Athena gives over the case to the jury and Apollo urges them to remember their oath. At this point the trial is interrupted by the proclamation of Athena's ordinance establishing the court of the Areopagus for all future time. While the voting proceeds, the Erinyes and Apollo alternately address the jury in an attempt to win their votes. From a legal standpoint this is entirely irregular. Before the votes are counted, Athena declares that her vote is for Orestes since she values the father more highly than the mother, and she adds that Orestes shall be acquitted if the votes are equal.

νικᾷ δ' Ὀρέστης, καὶ ἰσόψηφος κριθῇ.<sup>2</sup>

There has been some discussion on this point, two possibilities being suggested: (1) that if the jury is equally divided,

<sup>1</sup> In the fifth- and fourth-century Athenian law courts a speaker could question his opponent, and the judges could interrupt and ask questions of the speaker.

<sup>2</sup> *Eumenides* 741. Cf. Euripides *Iph. Taur.*, 965; *Electra*, 1265 ff.



Athena, by her vote, will make a majority in Orestes' favor; (2) that if Athena's vote makes equality, then this equality shall acquit the defendant. The second of these two views seems contradictory to the statement of Aeschylus that the ballots were equally divided.<sup>1</sup>

Aeschylus is a dramatist, not a legal historian. It is therefore not to be supposed that in an antiquarian spirit he sought to reproduce on the stage a pre-Draconian trial.<sup>2</sup> But even if he was satisfied in the main to project back the practice of his own day, it was inevitable that he should introduce antique features which would be more or less familiar to a cultured Athenian who had occasion to acquaint himself, as Aeschylus did, with the traditions regarding the Areopagus. The procedure of the court was ritualistic, and changes would take place very slowly. The history of homicide courts from Solon to Demosthenes, a period of nearly three centuries, is known, and during this time, although some changes in the organization occurred, yet the procedure remained practically the same.

Aeschylus does not reproduce the regular four set speeches of an Athenian homicide trial. It is not sufficient explanation to say that they are not suited to the drama. Euripides has shown that set speeches of accusation and defense can easily be managed. The method used by Aeschylus is reminiscent of the time when the trial took place before a single magistrate who had final jurisdiction. Each litigant, no doubt, presented his side of the case largely in the form of answers to questions of the magistrates, constantly interrupted and stimulated by protests and questions of his opponent. Aeschylus presents, then, a rather realistic picture of an ancient trial before a single magistrate.

The number of Areopagites in the drama, which is usually

<sup>1</sup> Verrall, *op. cit.*, p. xxix, remarks that from Aeschylus it would naturally be inferred that in his time an Areopagite jury was even in number and that the *archon basileus* who presided always voted, according to Athena's precedent, for acquittal, so that equality in the votes of the jurors always counted in favor of the defendant.

<sup>2</sup> Verrall, *op. cit.*, p. xli, considers the *Eumenides* a doubtful authority on law and legal history since the real issue of the play is religious, not legal.

supposed by commentators to be twelve, is of no importance here. From the fact that Athena declares that she will select a jury for this trial, Verrall argues that the Areopagus never sat in full assembly, but that a jury for each trial was selected from the whole group by some responsible official.<sup>1</sup> He finds it inconceivable that all members were compelled to attend each session and equally inconceivable that attendance was left to private inclination. Verrall speaks as if Athena meant to select from an already existing body of jurors, forgetting that she is instituting an entirely new court from her citizen body.<sup>2</sup>

A group of officials, known as the naucrars or naucraroi, (ναύκραροι) shared in the government during this period. They are first mentioned by Herodotus as an important body in connection with the conspiracy of Cylon which occurred in 630 B.C.<sup>3</sup> Attica was divided into forty-eight districts called naucraries (ναυκραρίαι). At the head of each was a naucrar (ναύκραρος). These forty-eight officials constituted an administrative body under the chairmanship of prytaneis (πρυτάνεις τῶν ναυκράρων). Each naucrary furnished a ship and two cavalrymen. The naucrars were responsible for the assembling and leadership of the military forces of their districts, under the direction of the polemarch. They collected and disbursed funds for the public service. The naucraries served also as administrative units in a system of local self-

<sup>1</sup> P. 182.

<sup>2</sup> According to Euripides' account in the *Orestes*, Orestes was not permitted to flee from Argos but was held for trial (46 ff., 430, 443, 870 ff.). But it must not be supposed that Euripides was attempting to picture an Argive homicide trial. The description is, however, interesting as a picture of a homicide trial before a popular assembly rather than before a court. In the first part of the play, the trial, as described by Electra, was to decide on the mode of Orestes' death, not on his guilt. But later in the rather sketchy description of the trial, the point at issue is whether he shall suffer the death penalty or not. The Argives apparently gather in full assembly. A herald opens the session. Then in succession come four speeches by different people, two in accusation and two in defense. So far, Euripides follows the regular Athenian procedure of four speeches in a homicide trial. But at this point Orestes is introduced with a speech in his own behalf.

<sup>3</sup> Herodotus v. 71. For the date of the Cylonian conspiracy, cf. Busolt-Swoboda, *Staatskunde*, p. 599, n. 1; *CAH*, IV, 661. For the naucraroi and their duties, cf. Busolt-Swoboda, *op. cit.*, pp. 817 ff.; How and Wells, *A Commentary on Herodotus*, *ad loc.*

government. This is indicated by the fact that Cleisthenes abolished the naucreries and instituted in their stead the demes under the presidency of demarchs.<sup>1</sup> The people of Attica, even after the unification, continued to cling to the land. These communities must have retained some powers of self-government. In the interests of unity, it was desirable to rearrange these communities, that cherished memories of their former independence, into new groups organized presumably as local self-government units. They served also as convenient units for recruiting the military forces of the state and collecting funds for the public service. The nobles that substituted aristocracy for monarchy were in all probability responsible for a reform that made for efficiency of administration and at the same time weakened the disruptive forces that interfered with the political solidarity of Attica. For the purpose of co-ordinating the local and national functions of the naucrars, they were organized into a single body with an executive committee called the "prytaneis of the naucrars." Their duties were similar to those of the prytaneis of the Cleisthenean Senate of Five Hundred.

The individual naucrars were the chief executives of their districts and military officers in the national army under the polemarch. As a body under the chairmanship of their prytaneis, they must have authorized the expenditure and disbursement of funds collected in their districts. A group of officials so intimately associated with the financial and military administration of the state must have possessed considerable power. Herodotus even says that the prytaneis of the naucrars governed Athens at the time of the conspiracy of Cylon in 630 B.C. But Herodotus was in error. Thucydides<sup>2</sup> in his account of the conspiracy says very pointedly that "at that time the nine archons transacted most of the public business." Apparently Thucydides had Herodotus' account before him and was correcting him.<sup>3</sup> In 630 B.C.

<sup>1</sup> Aristotle *Ath. Pol.* xxi. 5: κατέστησε δὲ καὶ δημάρχους τὴν αὐτὴν ἔχοντας ἐπιμέλειαν τοῖς πρότερον ναυκράροις· καὶ γὰρ τοὺς δῆμους ἀντὶ τῶν ναυκραριῶν ἐποίησεν.

<sup>2</sup> i. 126: τότε δὲ τὰ πολλὰ τῶν πολιτικῶν οἱ ἐννέα ἀρχοντες ἐπρασσον.

<sup>3</sup> Cf. Lipsius, *op. cit.*, p. 12, n. 46.

Cylon, with the aid of some Athenian sympathizers, seized the Acropolis in an attempt to establish a tyranny. Instead of gaining popular support as he had hoped, he encountered a vigorous national resistance. The time was not ripe for tyranny. The men of Attica flocked into the city from their farms and besieged the Acropolis. Growing weary of the long siege, the majority of them went away, "committing the task of guarding to the nine archons, to whom they also gave full power to settle the whole matter as they might determine to be best; for at that time the nine archons transacted most of the public business." Cylon escaped by stealth, and his adherents in despair betook themselves as suppliants to the altar of Athena Polias on the Acropolis. They were induced to leave the altar by a promise that they should not suffer the death penalty. The promise was broken, and the suppliants were put to death. Plutarch in his account of the conspiracy<sup>1</sup> is in agreement with Thucydides. The usual explanation of the discrepancy between Herodotus and Thucydides is that Herodotus, or his authority, was endeavoring to absolve the Alcmaeonid archon, Megacles, from the guilt of sacrilege by throwing the blame upon another board of officials.<sup>2</sup> This may be true, for there were factors in the situation that made misrepresentation, if not misunderstanding, easy.

Thucydides' narrative furnishes a simple explanation of the origin of the Herodotean version. When the siege began to grow tedious and the ultimate surrender of the besieged was inevitable, the majority of the levies withdrew after turning over to the nine archons the task of finishing the siege, with full powers to dispose of the affair as they thought best. Obviously, if the nine archons had not been empowered to act, the matter would have remained in the hands of the military authorities. The chief military officer was the polemarch. Subordinate to him were the naucrars. They had

<sup>1</sup> *Solon*, xii: ὥρμησε συλλαμβάνειν ὁ Μεγακλῆς καὶ οἱ συνάρχοντες, ὡς τῆς θεοῦ τὴν ἱερίαν ἀπολεγομένης· καὶ τοὺς μὲν ἔξω κατέλευσαν, οἱ δὲ τοῖς βωμοῖς προσφυγόντες ἀπεσφάγησαν.

<sup>2</sup> How and Wells, *op. cit.*, on Herodotus v. 71.

summoned the levies from the rural districts to recover the citadel from the control of invaders and rebels. If these military forces had continued in the field the naucrars, or their prytaneis, associated with the polemarch in the conduct of the military operations, would have fixed the terms of surrender and accepted responsibility for the custody of the rebels. Under these circumstances it is easy to see how the story that the naucrars were responsible for the sacrilege gained currency if not credence. The transfer of responsibility from the military to the civil authorities was forgotten or ignored. Thucydides was aware of the source of the error and took pains to point it out, albeit with characteristic reserve and restraint. But even if the story of Herodotus be entirely rejected, there are still indications that the naucrars were an important body. This appears from the fact that when the system was discontinued their functions were divided between the demarchs and the Senate of Five Hundred under the new tribe organization. There is no reason to believe that these functions included the administration of justice. Meyer believes that the prytaneis of the naucraroi had judicial functions.<sup>1</sup> He reaches this conclusion by identifying them with the court of the Prytaneum over which the king archon and the phylobasileis presided. This court, as has been stated above, did in early times have both criminal and civil jurisdiction, but Meyer's reasons for connecting it with the naucraroi are not at all convincing. It is generally supposed that adherents of Cylon who escaped the massacre were tried and exiled by a court described as ἐκ πρυτανείου. The allusion to those who were exiled for attempted tyranny in the Solonian amnesty law is generally believed to have reference to the Cylonian followers.<sup>2</sup> But, as has been pointed out above, the Areopagus and not the Prytaneum tried cases of attempted tyranny.<sup>3</sup>

<sup>1</sup> *Geschichte des Altertums*, II, 355; cf. Lipsius, *op. cit.*, p. 24, n. 79; and Busolt, *op. cit.*, p. 811, n. 1.

<sup>2</sup> Cf. Scholium on Aristophanes *Knights*, 445.

<sup>3</sup> Cf. *supra*, p. 108. Closely associated with the naucrars were the *kolakretai*, who, under the monarchy, had charge of public sacrifices and feasts. In addition

To a large extent in the homicide laws, Draco apparently reduced to writing existing practices, although it is of course to be admitted that he modified and developed existing law to some extent.<sup>1</sup> This must have been true of the other laws as well as of the homicide laws, but of these other laws very little is known.<sup>2</sup> The severity of the penalties provided by his laws became proverbial, and Aristotle considers this severity the only noteworthy thing about his laws.<sup>3</sup> He apparently made death the ordinary penalty for offenses generally, whether small or great. The action for idleness (*ἀργία*), which was still in force in the fourth century, is regularly assigned to Draco. According to some authorities, he punished *ἀργία* with death;<sup>4</sup> but according to others, with *ἀτιμία*.<sup>5</sup> At any rate, there is general agreement that *ἀτιμία* was the penalty in Solon's time for a third offense. Various other laws are attributed to Draco, but their genuineness is open to grave doubt. For example, laws on the education of youth,<sup>6</sup> religious laws,<sup>7</sup> and a law that judges should listen to both sides of a case<sup>8</sup> are assigned to him; but their authenticity is very doubtful.<sup>9</sup>

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they acted as royal treasurers. In later times they acted as treasurers of the *naucrariae*. Cf. Wilamowitz, *Aristoteles und Athen*, I, 52. These officials had no judicial functions, but in the fifth century they acted as paymasters of the dicasts. Cf. Scholium on *Wasps*, 695, 724.

<sup>1</sup> Cf. Busolt-Swoboda, *Staatskunde*, p. 816, who asserts that Draco by no means codified the entire body of the law but that his *θεσμοί* were simply additions to, and modifications of, the already existing law.

<sup>2</sup> For a summary, cf. Busolt-Swoboda, *op. cit.*, p. 814.

<sup>3</sup> *Pol.* 1274b. 16; *Rhet.* 1400b. 21; Demades in Plut. *Solon*, xvii.

<sup>4</sup> Diog. Laert. i. 55; Plut. *Solon*, xvii.

<sup>5</sup> *Pollux* viii. 42.

<sup>6</sup> Aeschines *Con. Tim.*, 7.

<sup>7</sup> Porphy. *De abstin.* 4. 22; Schol. *Ven. B. Il.* xv. 36 (respecting the gods to be used in oaths).

<sup>8</sup> Lucian. *Calumn.*, 8.

<sup>9</sup> Cf. Busolt-Swoboda, *op. cit.*, p. 814, n. 2.

## EXCURSUS

## THE SO-CALLED DRACONIAN CONSTITUTION

In some cases the lawgiver had a twofold task to perform: on the one hand, the writing of a code; and on the other, the reorganization of the constitution. Such was the case with Pittacus of Mytilene.<sup>1</sup> Lycurgus is reported to have changed the constitution of Sparta. The chief task of Pheidon of Cyme and his successor, Prometheus, was the remodeling of the constitution.<sup>2</sup> In Athens the demand for the codification of the laws resulted in the appointment of Draco as a special thesmothete.<sup>3</sup>

For a long time preceding Draco's legislation there was bitter dissatisfaction on the part of the common people. Aristotle describes the wretched condition of the peasantry:

The whole country was in the hands of a few persons, and if the tenants failed to pay their rent they were liable to be haled into slavery, and their children with them. All loans were secured upon the debtor's person, a custom which prevailed until the time of Solon, who was the first to appear as the leader of the people. But the hardest and bitterest part of the constitution in the eyes of the masses was their state of serfdom. At the same time they were discontented with every other feature of their lot: for, to speak generally, they had no part nor share in anything.<sup>4</sup>

There were many different elements which contributed to the strife between the classes. In the first place, within the governing party itself there was faction. Under such circumstances it is not surprising that attempts should be made to set up a tyranny. Cylon, supported by one faction of the eupatrids, seized the Acropolis. The Alcmaeonidae, heading another group, were responsible for the submission and capture of the Cylonian party, although Cylon himself had escaped. Botsford looks upon the Cylonian attempt as an oligarchic reactionary movement, i.e., an attempt to put

<sup>1</sup> Cf. Aristotle *Pol.*, 1274b; Bury, *History of Greece*, p. 187.

<sup>2</sup> Heracl. Pont., 11; cf. Holm, *History of Greece*, I, 270.

<sup>3</sup> Cf. Bury, *op. cit.*, p. 179, and Pauly-Wissowa, article on Draco. F. D. Smith, *Athenian Political Commissions*, p. 13, points out that Draco, in his capacity as a special thesmothete, performed with absolute discretionary power a task which under the democracy would have been given over to a commission of several members directly responsible to the people.

<sup>4</sup> *Ath. Pol.*, ii. Kenyon's translation. Cf. Plutarch, *Solon*, xiii, for the poverty and dependence of the thetic class.

down the *πλῆθος* and the more moderate oligarchs and to re-establish the oligarchy on its old basis.<sup>1</sup> However this may be, the incident shows clearly unrest and strife within the eupatrid group itself.<sup>2</sup> Again, wealth began to compete with birth as a basis for membership in the ruling class. The merchant class gained very great importance on becoming the wealthy class. The growth of commercial interests seems to have worked in two ways. On the one hand it promoted democracy. The poorest class was needed to man the ships, and thereby assumed a certain importance which helped to pave the way to political recognition.<sup>3</sup> On the other hand, the growth of commerce enhanced the sufferings of the farming class. It was possible to import grain at a lower cost than that at which it could be raised at home.<sup>4</sup> In addition, manufacturing and mercantile interests assumed far greater importance than farming. Finally, the introduction of money and its concentration in the hands of the merchant class, whereas formerly payment had always been made in kind, meant an economic crisis. The condition of the rural population became even worse as the result of the war with Megara, which broke out after the Cylonian attempt, since parts of the Attic territory were raided and the Megarian markets were closed.

Just what happened is not known. Either the peasants, with the aid of influential leaders, demanded measures which would alleviate their distress or else the eupatrids realized the danger which was imminent if relief were not granted.<sup>5</sup> At any rate, in 621 B.C. Draco was appointed special thesmothete to codify and write down the laws.

<sup>1</sup> *The Athenian Constitution*, p. 135.

<sup>2</sup> Wright (*The Date of Cylon*) placed the Cylonian conspiracy before the legislation of Draco, and his conclusions have been rather generally accepted. Cf. Freeman, *The Work and Life of Solon*, p. 164; Busolt-Swoboda, *Staatskunde*, p. 800. Cornelius, however, believes that the event occurred during the time of the Peisistratidae (*Die Tyrannis in Athen*, pp. 36 ff., 44).

<sup>3</sup> Cf. Bury, *op. cit.*, pp. 177 ff. For the economic situation in Greek states generally at this period, cf. Busolt-Swoboda, *op. cit.*, pp. 798 f.

<sup>4</sup> Cf. Botsford, *The Athenian Constitution*, p. 141.

<sup>5</sup> Freeman, *op. cit.*, p. 50, assumes that the people, who as yet had no status in the constitution, under the pressure of economic hardship met in unofficial assembly and voiced their dissatisfaction.



It may be asked if the Draconian code benefited the common people at all and how it succeeded in quieting them even for a short period of time, for Aristotle makes it evident that their condition of serfdom, by which they were most depressed, was not relieved by the legislation. The laws were obviously in the interest of the ruling class. For example, the laws regarding debtors were very severe. Up until the time of Solon the creditor could claim the person of the debtor in case he could not otherwise pay. At the same time, the fact that the rights of the ruling class were clearly defined in writing gave to the commons a feeling of greater security. Under the old system the man of wealth and birth could take what he wanted and the poor man had no written law by which he could defend himself. He did not even know what the law was. It is clear that whatever effect there was, was largely psychological, for the thetes were in reality given no privileges at all. That the satisfaction of the people was short-lived is shown by the fact that less than thirty years later the populace rose against the aristocracy, an uprising which culminated in the reforms of Solon.

It was generally assumed by ancient writers, including Aristotle in the *Politics*, that Draco made no constitutional changes, and they therefore treat the period between the completion of the unification of Attica and the Solonian reforms as a political unit; that is to say, there was no definite change in the constitution during this period although there were the natural developments and enlargements which would come about in a growing state. But in Aristotle's summary of the changes in the constitution of Athens he gives as the third step in its development the constitution of Draco,<sup>1</sup> and he actually gives the provisions of this alleged constitution in the fourth chapter of his treatise. Since the recovery of this document, the authenticity of this constitution has been a perennial subject of debate among scholars.<sup>2</sup>

<sup>1</sup> *Ath. Pol.*, xli.

<sup>2</sup> For the bibliography on both sides of the debate, cf. Busolt-Swoboda, *op. cit.*, I, 53, n. 2. For a detailed discussion of the reasons for rejecting the constitution, cf. Freeman, *op. cit.*, pp. 34 ff.; Ledl, *Studien zur älteren athenischen Verfassungsgeschichte*, pp. 18 ff. Linforth, *Solon the Athenian*, p. 76.

Ἡ μὲν οὖν πρώτη πολιτεία ταύτην εἶχε τὴν ὑπογραφὴν. μετὰ δὲ ταῦτα χρόνου τινὸς οὐ πολλοῦ διελθόντος ἐπ' Ἀρισταίχμου ἀρχοντος Δράκων τοὺς θεσμοὺς ἔθηκεν· ἡ δὲ τάξις αὕτη τὸνδε τὸν τρόπον εἶχε. ἀπέδεδото μὲν ἡ πολιτεία τοῖς ὅπλοι παρεχομένοις. ἡροῦντο δὲ τὸν μὲν ἐννέα ἀρχοντας καὶ τοὺς ταμίας οὐσίαν κεκτημένους οὐκ ἐλάττω δέκα μῶν ἐλευθέραν, τὰς δ' ἄλλας ἀρχὰς (τάς) ἐλάττους ἐκ τῶν ὅπλα παρεχομένων, στρατηγούς δὲ καὶ ἱππάρχους οὐσίαν ἀποφαίνοντας οὐκ ἐλάττον ἢ ἑκατὸν μῶν ἐλευθέραν καὶ παῖδας ἐκ γαμετῆς γυναικὸς γνησίους ὑπὲρ δέκα ἔτη γεγονότας· τοὺτους δ' ἔδει διεγγυᾶν τοὺς πρυτάνεις καὶ τοὺς στρατηγούς καὶ τοὺς ἱππάρχους τοὺς ἔνους μέχρι εὐθυνῶν, ἐγγυητὰς δ' ἐκ τοῦ αὐτοῦ τέλους δεχομένους οὐπὲρ οἱ στρατηγοὶ καὶ οἱ ἱππάρχαι. βουλευεῖν δὲ τετρακοσίους καὶ ἓνα τοὺς λαχόντας ἐκ τῆς πολιτείας. κληροῦσθαι δὲ καὶ ταύτην καὶ τὰς ἄλλας ἀρχὰς τοὺς ὑπὲρ τριάκοντ' ἔτη γεγονότας, καὶ δις τὸν αὐτὸν μὴ ἀρχεῖν πρὸ τοῦ πάντας ἐξελεῖν· τότε δὲ πάλιν ἐξ ὑπαρχῆς κληροῦν. εἰ δὲ τις τῶν βουλευτῶν, ὅταν ἔδρα βουλῆς ἢ ἐκκλησίας ᾗ, ἐκλείποι τὴν σύνοδον, ἀπέτινον ὁ μὲν πεντακοσιομέδιμνος τρεῖς δραχμάς, ὁ δὲ ἱππεὺς δύο, ξενίγτης δὲ μίαν. ἡ δὲ βουλή ἢ ἐξ Ἀρείου πάγου φύλαξ ἦν τῶν νόμων καὶ διετήρει τὰς ἀρχὰς ὅπως κατὰ τοὺς νόμους ἀρχωσιν. ἐξῆν δὲ τῷ ἀδικομένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλὴν εἰσαγγέλλειν ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον. ἐπὶ δὲ τοῖς σώμασιν ἦσαν οἱ δανεισμοί, καθάπερ εἴρηται, καὶ ἡ χώρα δι' ὀλίγων ἦν.

("Such was, in outline, the first constitution, but not very long after the events above recorded, in the archonship of Aristaiichmus, Draco enacted his ordinances. Now his constitution had the following form. The franchise was given to all who could furnish themselves with a military equipment. The nine Archons and the Treasurers were elected by this body from persons possessing an unencumbered property of not less than ten minas, the less important officials from those who could furnish themselves with a military equipment, and the Generals (Strategi) and commanders of the cavalry (Hipparchi) from those who could show an unencumbered property of not less than a hundred minas, and had children born in lawful wedlock over ten years of age. These officers were required to hold to bail the Prytanēs, the Strategi, and the Hipparchi of the preceding year until their accounts had been audited, taking four securities of the same class as that to which the Strategi and the Hipparchi belonged. There was also to be a Council, consisting of four hundred and one members, elected by lot from among those who possessed the franchise. Both for this and for the other magistracies the lot was cast among those who were over thirty years of age; and no one might hold office twice until every one else had had his turn, after which they were to cast the lot afresh. If any member of the Council failed to attend when there was a sitting of the Council or of the Assembly, he paid a fine, to the amount of three drachmas if he was a Pentacosiomēdimnus, two if he was a Knight, and one if he was a Zeugites. The Council of Areopagus was guardian of the laws, and kept watch over the magistrates to see that they executed their offices in accordance with the laws. Any person who felt himself wronged might

lay an information before the Council of Areopagus, on declaring what law was broken by the wrong done to him. But, as has been said before, loans were secured upon the persons of the debtors, and the land was in the hands of a few.”<sup>1</sup>

No other author specifically credits Draco with being the framer of a constitution.<sup>2</sup> In fact, Aristotle himself, in the *Politics*,<sup>3</sup> says that Draco made laws for a constitution that was already in existence (πολιτεία ὑπαρχούση). He adds that there was nothing in the laws worth mentioning except the severity of the punishments. The authenticity of this passage of the *Politics* has been questioned.<sup>4</sup> But in view of the silence of other authors on a Draconian constitution it is dangerous to reject the assertion in the *Politics*, whether it be regarded as written by Aristotle or by a pupil. Because of the discrepancy between the *Politics* and the *Constitution of Athens*, the real test of the genuineness of the constitution is the internal evidence of the passage of the *Constitution of Athens* under discussion. The main points of the constitution are as follows:

1. A hoplitic franchise already in existence.
2. The election by the enfranchised of archons, treasurers, generals, hipparchs, and prytaneis, for all of which offices property qualifications are specified. There is a reference to an audit and to the use of the lot in the selection of some of the officials.
3. A council of 401 selected by lot from among the enfranchised of thirty years of age or more, with rotation of office.

<sup>1</sup> The text and translation are those of Kenyon (1920).

<sup>2</sup> There are two passages which might be interpreted to mean that Draco made a new constitution, Ps. Plato *Axiochus*, 365 D, and Cic. *de republ.* ii. 1. 2. Both are late and should not be pressed.

<sup>3</sup> ii. 12 (1274b). Cf. *CAH*, III, 593: “Draco regulated existing institutions rather than created new ones.”

<sup>4</sup> For the inconsistencies in the passage and the reasons for doubting its Aristotelian authorship, cf. Newman, *The Politics of Aristotle*, II, 376 f. He concludes: “Aristotle may have left only the fragment about Solon and a few rough data for insertion after the notice of the Carthaginian constitution and some member of the school, not very long after his death, completed them as he best could.”

4. Graduated fines for members of the council for non-attendance at assembly or council meetings.
5. The duties of the Areopagus.

In the first place, it is stated that the franchise had already been given to all who could furnish themselves with military equipment. This is the only possible meaning if the pluperfect ἀπεδέδοτο of the manuscript is retained. Kenyon believes that if the extension of the franchise had taken place earlier, due account of the fact would have been taken in the preceding chapter, which is a rather detailed description of the state of affairs before Draco. He translates: "the franchise was given"; and in his annotated edition of the Greek text suggests that ἀπεδίδοτο should be read.<sup>1</sup> Sandys, following the translation of Poste, states that the tense (pluperfect) implies that the franchise had already been given and that therefore this sentence does not belong to the alleged Draconian constitution.<sup>2</sup> Poste comments further that this interpretation agrees with the statement in the *Politics* that Draco did not alter the constitution. The political revolution had already taken place, and Draco's task was merely to adjust the laws to the new state of affairs. The hoplitic franchise, however, is one of the features of the constitution proposed by the party of Theramenes in 411 B.C.<sup>3</sup> δοκοῦσι δὲ καλῶς πολιτευθῆναι κατὰ τούτους τοὺς καιροὺς, πολέμου τε καθεστῶτος καὶ ἐκ τῶν ὀπλῶν τῆς πολιτείας οὕσης. Various scholars consider this one of the particularly striking resemblances between the constitution of Draco and the constitutions of 411 B.C. which prove the former to be a complete anachronism. Headlam pointed this out in some detail,<sup>4</sup> and Busolt showed that the document was constructed in accordance with conditions which existed only in the second half of the fifth cen-

<sup>1</sup> Confusion between the present and perfect forms of ἀποδίδωμι is rather common. Compare, e.g., the description of the Areopagus in *Lysias* i. 30: ᾧ καὶ πατρίων ἐστι καὶ ἐφ' ἡμῶν ἀποδίδοται (or ἀποδέδοται) τοῦ φόνου τὰς δίκας δικάζειν. Cf. *infra*, p. 330.

<sup>2</sup> Sandys, *Aristotle's Constitution of Athens*, ad loc.

<sup>3</sup> Aristotle *Ath. Pol.* xxxiii. 2; cf. Thucydides viii. 97; Xenophon *Hell.* ii. 3.48.

<sup>4</sup> *Class. Rev.*, V, 168.

tury.<sup>1</sup> It is based on a time when the *ζευγίτης*, owing to the hardships of war, could no longer provide himself with military equipment. Hence *παρεχόμενοι τὰ ὄπλα* was substituted for *ζευγίται*. So, in the case of the higher officials, the *πεντακοσιομέδιμνοι* and *ἱππεῖς* no longer possessed the proper property census. Hence the specific property qualifications.

Nothing is gained from a comparison with the constitution of Solon. By that the franchise was apparently granted to all who measured up to the thetic census,<sup>2</sup> which was certainly lower than the hoplitic. This could be either a wholly new provision on the part of Solon or could be viewed as merely an extension of the provisions of Draco, if the alleged constitution of Draco is accepted. In view, however, of the other striking resemblances between the Draconian constitution and those of 411 B.C., it seems well to view the provision as an anachronism.<sup>3</sup>

The next section of the constitution deals with the officials, their qualifications, and the method of selection. All *ὄπλα παρεχόμενοι* are represented as electing the officials:<sup>4</sup> the archons and treasurers were required to possess property worth not less than 10 minas, and free from debt;<sup>5</sup> the lesser officials could be chosen from any of the enfranchised; and the generals and hipparchs from those who possessed unencumbered property worth not less than 100 minas and had legitimate children of more than ten years of age. In Solon's constitution,<sup>6</sup> after a detailed description of the methods of election introduced by Solon, Aristotle continues: "Such was Solon's legislation with respect to the nine archons; whereas

<sup>1</sup> Busolt-Swoboda, *op. cit.*, 56.

<sup>2</sup> Aristotle *Ath. Pol.* vii. 3.

<sup>3</sup> This view has been followed by various scholars, e.g., E. Meyer, *Forschungen*, I, 237 ff.; De Sanctis, *op. cit.*, pp. 161 ff. Wilcken, *Zur Drakontischen Verfassung*, p. 85. Botsford, *op. cit.*, p. 146, argues that in the time of Homer the agora was composed of the men who were liable to military service. The same was true in Athens. Hence Draco did nothing to widen citizenship.

<sup>4</sup> Cf. Keil, *Die Solonische Verfassung*, pp. 114 ff.

<sup>5</sup> Busolt-Swoboda, *op. cit.*, p. 54, n. 1, assume that the archon could at the same time have much mortgaged property.

<sup>6</sup> *Ath. Pol.*, viii.

*in early times* the Council of the Areopagus summoned suitable persons according to its own judgment and appointed them for the year to the several offices." This is perfectly consistent with the account of the pre-Draconian constitution described in chapter iii, where Aristotle says that the archons were elected on a basis of wealth and birth and that the Areopagus was made up of ex-archons. It is surprising that Aristotle takes no account of the intermediate method ascribed to Draco in chapter iv. Again, the property qualifications make this one of the most suspicious passages in the constitution. Although Kenyon retains this feature of the constitution, as he retains it all, he agrees that the qualifications for archons and treasurers is absurdly low. Headlam<sup>1</sup> says that at this time property was reckoned not in money but in corn. According to Plutarch,<sup>2</sup> a *ζευνίτης* had to possess land capable of producing 200 *μέδιμνοι* a year; and a *μέδιμνος* of corn was worth about a drachma at this time. The value of land of this extent can be estimated only roughly. Headlam puts it at not less than 2,000 drachmas—20 minas. According to the Draconian constitution, the possession of land worth 10 minas (1,000 drachmas) constituted eligibility to the archonship. This qualification, being lower than that of the *ζευνίτης*, would not have constituted eligibility for any office under Solon. Recognizing this fact, Thompson<sup>3</sup> argues that not *δέκα*, but *ἐκατόν*, should be read here. This would make the property qualification the same for the archons and generals. Those who accept the constitution are driven to some such argument as this, for it is not to be supposed that Draco lowered the property qualification for archons and that it was then raised very considerably by Solon, who restricted the archonship to the first class. It is of course true that there was some kind of property qualification long before the time of Draco. Aristotle says in chapter iii, "the archons were elected under *qualifications of wealth and birth*."

Another suspicious feature in this passage is the list of

<sup>1</sup> *Op. cit.*, p. 167.

<sup>2</sup> *Solon*, xviii.

<sup>3</sup> *Class. Rev.*, V, 223 f.

officials. Thucydides states that at the time of the affair of Cylon the chief power lay in the hands of the nine archons.<sup>1</sup> The polemarch had the chief command in war long after this time.<sup>2</sup> Yet, in the Draconian constitution the generals and hipparchs appear as far more important officials than the archons. Busolt regards this as evidence that the Draconian constitution is a document of the fifth century, when the archons were relatively unimportant.<sup>3</sup> Further, the naucraroi and the kolakretai, who played a great part in early Attic history, are not mentioned in the passage. It is significant that these officials were no longer in existence in 411 B.C.<sup>4</sup> In regard to the *στρατηγοί* in general, Headlam says as follows:

1. There is no other record of *στρατηγοί* at this time. In chapter vii, where a considerable list of officials is given, they are not mentioned.
2. The clause that they must have children is quite new.
3. If there were *στρατηγοί* they must have held an inferior position, and the high property qualification is unaccountable.<sup>5</sup>

The decisive argument against the passage is the failure of Solon to mention officials who are as important as they appear in the Draconian constitution. Furthermore, both generals and hipparchs are mentioned in the lists of officials in the proposed constitution of 411 and are very important. They were to serve without pay, which of course presupposes a property qualification.<sup>6</sup> The archons and the prytaneis during the period of the Peloponnesian War were the only

<sup>1</sup> I. 126. 8.

<sup>2</sup> *Op. cit.*, p. 57.

<sup>3</sup> *Ath. Pol.* xxii. 2.

<sup>4</sup> Busolt-Swoboda, *op. cit.*

<sup>5</sup> It is interesting to note qualifications of a similar character at a later date. Cf. Deinarchus *Contra Dem.*, 71: τοὺς νόμους προλέγειν τῷ ῥήτορι καὶ τῷ στρατηγῷ . . . παιδοποιεῖσθαι κατὰ τοὺς νόμους, γῆν ἐντὸς ὧρων κεκτήσθαι, κ.τ.λ. It is quite possible that the development of the *στρατηγία* began soon after Draco's legislation (cf. *supra*, p. 84, n. 2), but the fact that they are not mentioned in Solon's constitution shows that they had as yet assumed little importance in his time.

<sup>6</sup> *Ath. Pol.* xxx. 2; cf. xxix. 5: τὰς δ' ἀρχὰς ἀμισθοὺς ἀρχειν ἀπάσας ἕως ἂν ὁ πόλεμος ᾖ, πλὴν τῶν ἐννέα ἀρχόντων καὶ τῶν πρυτανέων οἱ ἂν ὦσιν.

officials who were to receive pay. This implies that no high property qualification for these offices was required. The high qualification for generals and the low one for archons would be quite natural in fifth-century Athens.

These officials were to hold to bail the prytaneis, the generals, and the hipparchs of the preceding year until their accounts had been audited, taking securities.<sup>1</sup> In later times all regular officials at Athens were subject to an audit, and there is no reason to suppose that there would not be some check upon them long before Draco. This seems to be implied among the powers of the Areopagus in chapter iii.<sup>2</sup> But the mention of prytaneis in this passage is puzzling; it may be that the archons are meant, for it is quite possible that the archons were called prytaneis up to the time of Solon.<sup>3</sup> The correct interpretation, however, seems to be to identify them with the presidents of the council and assembly in later days and to view this passage as inspired by the oligarchic party of 411 B.C.<sup>4</sup> If Aristotle, writing in the fourth century, had meant others than the chairmen of the council, he would certainly have been more specific.<sup>5</sup>

The next section of the constitution deals with a council of 401. This is quite new. In chapter viii Aristotle says that Solon made a council of 400, 100 from each tribe. The verb ἐποίησε seems to imply that Aristotle thought that Solon instituted a new council. And he seems to be contrasting the new council of 400 with the Areopagus, which previously had existed by itself. No council of Draco is ever mentioned by other writers. In fact, Plutarch credits Solon with the in-

<sup>1</sup> Another interpretation (cf. Sandys, *ad loc.*) is that the new group of officials had to have security given on their behalf until the time of their audit. διεγγυᾶσθαι would then be passive.

<sup>2</sup> Keil, *op. cit.*, pp. 114 ff., says that in the time of Draco the audit was in the hands of the Areopagus.

<sup>3</sup> Cf. Sandys, *ad loc.*

<sup>4</sup> In this connection it is interesting to note that the prytaneis appear along with archons in one of the constitutions of 411 B.C. (*Ath. Pol.* xxix. 5).

<sup>5</sup> Cf. Keil, *op. cit.*, p. 96; Busolt-Swoboda, *op. cit.*, p. 54, "die Vorsitzenden des Rates"; Fränkel, *Rhein. Mus.*, XLVII (1892), 481; Schöffer, *Jahresb. über Fortschritte d. kl. Altertumsu.*, LXXXIII (1895), No. 1, 197.



stitution of the council of 400.<sup>1</sup> Kenyon explains the seeming inconsistency by asserting that Solon merely changed the membership from 401 to 400. Botsford assumes that there was a *boulé* in some form alongside the Areopagus before Draco, and that Draco was not adding anything new in this council of 401.<sup>2</sup> In the estimation of Wilamowitz, the odd number of 401 is a sign of the genuineness of the document.<sup>3</sup> Keil compares the odd number with other early odd numbers, e.g., nine archons, fifty-one ephetae, the Eleven.<sup>4</sup> The odd number, on the other hand, recalls also the courts of 201 and 501 under the democracy.<sup>5</sup> Furthermore, this passage is similar to a provision of one of the constitutions of 411 B.C.: *βουλευεῖν μὲν τετρακοσίους κατὰ τὰ πάτρια, τετταράκοντα ἐξ ἑκάστης φυλῆς, ἐκ προκρίτων οὓς ἂν ἔλωνται οἱ φυλέται τῶν ὑπὲρ τριάκοντα ἔτη γεγονότων.*<sup>6</sup> "There should be a Council of Four Hundred, as in the ancient constitution, forty from each tribe, chosen out of candidates of more than thirty years of age, elected by the members of the tribes." The system of rotation of office is also found in 411 B.C.<sup>7</sup> Headlam insists that it was the mark of a developed democracy and could not have been true in the time of Draco. The mention of the lot in connection with the council and minor offices is striking. It is a debatable question whether in Solon's time the election of officials was a combination of lot and election, as Aristotle asserts.<sup>8</sup> But there is reason to suppose that the use of the lot was much older than Solon.<sup>9</sup>

<sup>1</sup> *Solon*, xix.

<sup>2</sup> Botsford, *op. cit.*, p. 146. In Botsford's opinion the two main points affecting the constitution are the franchise and the council of 401. If Draco made no technical change in these two points, Aristotle could with truth say in the *Politics* that Draco adapted his laws to an already existing constitution. Botsford does not at all prove that the pre-Draconian constitution was practically like that given in chapter iv.

<sup>3</sup> *Aristoteles und Athen*, I, 88, n. 25.

<sup>6</sup> *Ath. Pol.* xxxi. 1. Cf. xxx. 2.

<sup>4</sup> *Op. cit.*, p. 96.

<sup>7</sup> xxxi. 3.

<sup>5</sup> Cf. Busolt-Swoboda, *op. cit.*, p. 57.

<sup>8</sup> *Ath. Pol.*, viii.

<sup>9</sup> Cf. Headlam, *Election by Lot at Athens*, p. 183. For the introduction of allotment into the selection of the archons, cf. Ferguson, "The Oligarchic Revolution at Athens of the Year 103-2 B.C.," *Klio*, IV, 1 ff. Cf. also, S. B. Smith, "The Establishment of the Public Courts at Athens," *TAPA*, LVI, 113.

The fourth section introduces the subject of fines for non-attendance of council members at meetings of the council and assembly, and in this connection three of the property classes which have been believed to belong to Solon are mentioned. The fact that Aristotle describes the formation of these classes in such detail under Solon casts grave doubt on this passage, despite the fact that in the passage about Solon, Aristotle says: "He divided the population according to property into four classes, just as it had been divided before."<sup>1</sup> As far as the fine for non-attendance is concerned, the only other instance in Athenian history of a fine for non-attendance is to be found in the constitution of the Four Hundred.<sup>2</sup>

The final passage of the constitution deals with the Areopagus. The main differences between the description of the body here and in the pre-Draconian constitution in chapter iii are certain judicial features. These properly belong to Draco's code and have been discussed in that connection.<sup>3</sup>

From the foregoing account it is clear that, owing to the inconsistencies and anachronisms of chapter iv, the constitution contained therein cannot be a constitution which was established in the time of Draco. It appears, then, that as far as the constitution was concerned, Draco merely regulated existing institutions and did not create new ones. The Aristotelian authorship of the passages has been much debated. Certainly several other passages in the *Constitution of Athens* indicate that Aristotle ascribed a constitution to Draco. At the beginning of chapter iii, Aristotle makes the following statement: "The form of the ancient constitution before Draco was as follows. . . ." If genuine, this sentence certainly presupposes a change in the time of Draco—whether

<sup>1</sup> vii. 3.

<sup>2</sup> xxx. 6.

<sup>3</sup> Cf. *supra*, p. 95. Scholars who consider the constitution an interpolation are divided on the question whether this final section about the Areopagus is an interpolation or part of the original. Headlam, *Class. Rev.*, V, 168, accepts the section and translates: "Draco published his code of law, but the Areopagus maintained its position and had to guard the (new) laws. And any person who had been maltreated could go to the Areopagus and show them which of the (new) laws had been broken." Busolt-Swoboda, *op. cit.*, p. 57, considers it part of the spurious constitution. Cf. Wilcken, *op. cit.*, p. 93.

that change be one in form or merely in the fact that the constitution was written down by Draco just as his laws were written. The second passage of interest in this connection is that part of chapter xli which enumerates the various changes which the Athenian constitution had undergone. Aristotle explains that the constitution which existed in his own day was the eleventh change in the Athenian constitution. He proceeds as follows:

πρώτη μὲν γὰρ ἐγένετο μετὰστασις<sup>1</sup> τῶν ἐξ ἀρχῆς, "Ἴωνος καὶ τῶν μετ' αὐτοῦ συνοικησάντων" τότε γὰρ πρῶτον εἰς τὰς τέτταρας συνενεμήθησαν φυλὰς καὶ τοὺς φυλοβασιλέας κατέστησαν. δευτέρα δὲ καὶ πρώτη μετὰ ταύτην, ἔχουσα πολιτείας τάξιν, ἡ ἐπὶ Θήσεως γενομένη, μικρὸν παρεγκλίνουσα τῆς βασιλικῆς. μετὰ δὲ ταύτην ἡ ἐπὶ Δράκοντος, ἐν ᾗ καὶ νόμους ἀνέγραψαν πρῶτον. τρίτη δ' ἡ μετὰ τὴν στάσιν ἡ ἐπὶ Σόλωνος, ἀφ' ἧς ἀρχὴ δημοκρατίας ἐγένετο. τετάρτη δ' ἡ, κ.τ.λ.

It is noteworthy that the constitution of Draco does not receive a number. One group of scholars<sup>2</sup> insists that the constitution of Ion was not reckoned in the enumeration because it was the original establishment and not a change. Hence the constitution of Theseus, which Aristotle describes as δευτέρα δὲ καὶ πρώτη μετὰ ταύτην (i.e., after that of Ion), is the first change and therefore the first in the enumeration. This allows the constitution of Draco to count as second, although it has no number; and then the constitution of Solon is really τρίτη; that of Peisistratus, the fourth change; and so on. The other group, many of them accepting the reading κατάστασις, insists that the constitution in the time of Ion counts as the first, that of Theseus second, and that of Solon third. Therefore the bit about Draco without a number is an interpolation inserted to harmonize with the interpolation of chap. iv.<sup>3</sup> The emphasis in this passage upon Draco's work as a lawgiver as the chief characteristic of his constitution is certainly inconsistent with chapter iv.<sup>4</sup> But other like inconsistencies can be found within the *Constitution of Athens*. For example, there is certainly inconsistency between chapters

<sup>1</sup> Blass conjectures *κατάστασις*. The MS reading is: . . . . *ατατασις*.

<sup>2</sup> Cf. Kenyon, *ad loc.*

<sup>3</sup> Cf. Sandys, *ad loc.*

<sup>4</sup> Cf. Headlam, *Class. Rev.*, V, 167.

viii and xxii in regard to the election of archons before the time of Cleisthenes.<sup>1</sup>

The next passage in question occurs in the description of the Solonian reforms: "He divided the population according to property into four classes, *just as it had been divided before*, namely Pentacosiomedimni, Knights, Zeugitae and Thetes."<sup>2</sup> The Draconian constitution mentions this division, with the exception of thetes, in connection with fines for non-attendance in council and assembly. The italicized words may be viewed as an interpolation or as evidence of the authenticity of the Draconian constitution.<sup>3</sup>

Chapter v, immediately following the Draconian constitution, begins as follows: *τοιαύτης δὲ τῆς τάξεως οὐσης ἐν τῇ πολιτείᾳ . . .* ("since such, then, was the organization of the constitution, and the many were in slavery to the few, the people rose against the upper class"). Sandys remarks that if chapter iv is an interpolation, then the use of *τάξεως* here becomes open to suspicion "unless we are content to regard the powers of the Areopagus and the right of bringing grievances before them as sufficient to constitute a *τάξις*, or constitutional order of things." Sandys is, of course, accepting the final part of chapter iv.<sup>4</sup> On the other hand, if chapter iv is considered an interpolation, it is not at all difficult to understand that the words refer back to the situation described in chapter iii.

It is plain that all of these passages can be explained both by those who accept the constitution as the work of Aristotle and by those who consider it an interpolation. In view, however, of all the passages discussed above, it seems more reasonable to suppose that Aristotle really ascribed a constitution to Draco and that he is himself responsible for chapter iv than to suppose that the passages are the work of a very

<sup>1</sup> viii. 1, and xxii. 5.

<sup>2</sup> vii.

<sup>3</sup> All of the three passages which have been discussed are bracketed in the Blass-Thalheim edition. Kenyon, on the other hand, accepts them all in his Oxford edition (1920) and in his annotated edition and translation. The latest Teubner edition (Blass-Thalheim-Oppermann) brackets nothing.

<sup>4</sup> *Ad loc.*

skilful interpolator. No interpolator after Aristotle would have been interested either in inserting a constitution in the treatise of Aristotle or in inserting the other passages to agree with it. Provided, then, it is the work of Aristotle, where did he get it? It has been shown above that suspicion can be thrown upon practically every line of the constitution and that it certainly cannot be a constitution framed by Draco. It has been shown further that practically every provision in it reflects the provisions of the constitutions of 411 B.C. The case seems, then, to be as follows: The document is an anachronism found by Aristotle in some pamphlet written by the party politicians of the time of the Four Hundred and purporting to give the provisions of the ancient constitution (*πάτριος πολιτεία*). Aristotle incorporated it in his treatise as the constitution of Draco. The passage about the Areopagus alone is true for the time of Draco.

## CHAPTER V

### THE JUDICIAL REFORMS OF SOLON

The judicial reforms of Solon, which secured a minimum of popular participation in the administration of justice and laid the foundation of democracy, are among the most important in Athenian history. And yet, in spite of the keen interest which Greek political thinkers and reformers always exhibited in the so-called *πάτριος πολιτεία*, surprisingly few details are found in the sources. Obviously the best source is the poetry of Solon. Aristotle and Plutarch had Solon's poems before them and quoted freely from them.

Solon was not without some experience in matters of law and justice before he was chosen as lawgiver. He represented Athens in the adjudication by Spartan arbitrators of the dispute between Athens and Megara regarding the ownership of Salamis. To prove his case, he cited a couplet from Homer,<sup>1</sup> and some Delphian oracles in which Apollo spoke of Ionian Salamis. He also brought forward archaeological evidence to show that the ancient graves on the island were Athenian, not Megarian: "The Megarians buried their dead facing the east, but the Athenians facing the west."<sup>2</sup> When the chronic quarrel between the Alcmaeonidae and the Cylonian factions was on the verge of involving the city in civil war, Solon persuaded the accused Alcmaeonidae<sup>3</sup> to submit to trial, thus showing his faith in the efficacy of the reign of law (*εὐνομίη*), which he praises in his poetry.

The responsibility for the civil strife in the city, which led to his own selection as *διαλλακτήης* and archon, he ascribes

<sup>1</sup> *Iliad* ii. 557-58:

Αἴας δ' ἐκ Σαλαμῖνος ἄγεν δυοκαίδεκα νῆας,  
στήσε δ' ἄγων ἔν' Ἀθηναίων ἱσταντο φάλαγγες.

Plutarch *Solon*, x, says that Solon invented the lines.

<sup>2</sup> Plutarch, *op. cit.*, x, translated by Perrin.

<sup>3</sup> Plutarch, *op. cit.*, xii.

to the greed and arrogance of the wealthy.<sup>1</sup> They are led to seek their own advantage at the expense of their fellows. Lawlessness results. "They spare neither the treasures of the gods nor the property of the state, and steal like brigands, one from another. They pay no heed to the unshaken rock of holy justice."<sup>2</sup> Lawlessness<sup>3</sup> is the chief cause of the ills from which a city suffers. The practice of lending money on the security of the debtor's person was bad enough, but the "crooked decisions" of magistrates in administering the law intensified the evil. Debtors were sometimes unjustly adjudged to be slaves of their creditors.<sup>4</sup>

Under the reign of law, on the other hand, crooked judgments are made straight and arrogance is softened.<sup>5</sup> Solon drafted laws fair alike to rich and poor.<sup>6</sup> But laws are not

<sup>1</sup> Aristotle *Ath. Pol.* v. 2: ἰσχυρᾶς δὲ τῆς στάσεως οὕσης καὶ πολὺν χρόνον ἀντικαθημένων ἀλλήλοις εἰλοντο κοινῇ διαλλακτὴν καὶ ἀρχοντα Σόλωνα, κ.τ.λ. Cf. Plutarch, *op. cit.*, xiv; *Ath. Pol.* v. 3: καὶ ὅλως αἰεὶ τὴν αἰτίαν τῆς στάσεως ἀνάπτει τοῖς πλουσίοις διὸ καὶ ἐν ἀρχῇ τῆς ἐλεγγείας δεδοικέναι φησὶ 'τὴν τε φιλαργυρίαν τὴν θ' ὑπερφανίαν,' ὡς διὰ ταῦτα τῆς ἐχθρᾶς ἐνεστώσης.

<sup>2</sup> *Elegy* 2. 11 ff., translation by Linforth. The references to Solon are to the Teubner text of Hiller-Crusius.

πλουτοῦσιν δ' ἀδίκους ἔργμασι πειθόμενοι  
οὔθ' ἱερῶν κτεάνων οὔτε τι δημοσίων  
φειδόμενοι κλέπτουσιν ἐφ' ἀρπαγῇ ἄλλοθεν ἄλλος,  
οὐδὲ φυλάσσονται σεμνὰ θέμεθλα Δίκης.

<sup>3</sup> *Ibid.*, 31 f.:

ταῦτα διδάξει θυμὸς Ἀθηναίους με κελεύει,  
ὥς κακὰ πλείστα πόλει δυσνομίη παρέχει.

<sup>4</sup> Solon *Frag.* 32. 8 ff.:

πολλοὺς δ' Ἀθήνας πατριδ' εἰς θεόκτιτον  
ἀνήγαγον πραθέντας, ἄλλον ἐκδίκως,  
ἄλλον δικαίως, τοὺς δ' ἀναγκαίης ὑπο  
χρεοῦς φυγόντας.

<sup>5</sup> *Elegy* 2. 33 ff.:

εὐνομίη δ' εὐκοσμία καὶ ἄρτια πάντ' ἀποφαίνει,  
καὶ θ' ἅμα τοῖς ἀδίκουσ' ἀμφιτίθισσι πέδας.  
τραχέα λειαίνει, παύει κόρον, ὕβριν ἀμαυροῖ,  
αὐαίνει δ' ἄτης ἀνθεα φύόμενα,  
εὐθύνει δὲ δίκας σκολιάς ὑπερήφανα τ' ἔργα  
πραυνει, παύει δ' ἔργα διχοστασίης, κ.τ.λ.

<sup>6</sup> Solon *Frag.* 32. 18 ff.:

θεσμοὺς δ' ὁμοίως τῷ κακῷ τε κάγαθῷ,  
εὐθείαν εἰς ἕκαστον ἀρμόσας δίκην,  
ἔγραψα.

enough; they must be impartially administered; else, as Anacharsis<sup>1</sup> said, "like spiders' webs they would catch the weak and poor, but would easily be broken by the mighty and rich." Hence, he "organized the people," giving them just enough power to maintain their rights<sup>2</sup> and uphold the reign of law. These hints regarding the judicial measures of Solon, drawn from his own writings, will be found useful in interpreting the more specific information contained in other sources.

Certain marked discrepancies between Aristotle's account of the work of Solon in the *Constitution of Athens* and that contained in the *Politics*<sup>3</sup> have been observed and variously explained. But if one keeps in mind the different methods of approach in the two works, he will find the discrepancies explainable. Indeed, they are inevitable. In the *Constitution of Athens* Aristotle traces the growth of the constitution step by step, but in the *Politics* he draws illustrations of his political theories from Athenian constitutional practice with but little regard to dates and origins.

In the *Constitution of Athens*, Aristotle's treatment of Solon's judicial reforms is meager and disappointing. In a single sentence he tells us that the lowest class, the thetes, shared in the government only to the extent of participating in the assembly (ἐκκλησία) and the law courts (δικαστήρια).<sup>4</sup> There is not a word about the organization and functions of either the ἐκκλησία or the δικαστήριον. It occasions some surprise to encounter, two chapters later, the statement that the right of appeal to the δικαστήριον was one of three great democratic features of the Solonian constitution.<sup>5</sup> One must

<sup>1</sup> Plutarch *Solon*, v.

<sup>2</sup> Solon *Frag.* 32. 1 f. (For the text given here, cf. Linforth, *Solon the Athenian*, p. 136.)

ἐγὼ δὲ, τῶν μὲν οὐνεκα ξυνήγαγον  
δῆμον, τὶ τοῦτων πρὶν τυχεῖν ἐπανασάμην;

Cf. *Frag.* 3. 1.

<sup>3</sup> Page 1273b, quoted *supra*, p. 88. Some have regarded the passage as spurious. The objections are not convincing. Cf. S. B. Smith, "The Establishment of the Public Courts at Athens," *TAPA*, LVI, 107, n. 5.

<sup>4</sup> *Ath. Pol.* vii. 3: τοῖς δὲ τὸ θητικὸν τελούσιν ἐκκλησίας καὶ δικαστηρίων μετέδωκε μόνον.

<sup>5</sup> *Ibid.*, ix 1.



go to Plutarch to learn definitely that only the decisions of the magistrates were subject to appeal. The careful reader, who recalled Aristotle's earlier statement, *κύριοι δ' ἦσαν* [the magistrates] *καὶ τὰς δίκας αὐτοτελεῖς κρίνουν καὶ οὐχ ὥσπερ νῦν προανακρίνουν*,<sup>1</sup> might reach this conclusion independently of Plutarch, but the ordinary reader would never guess it. He would not unnaturally conclude that all judicial decisions were subject to review by the *δικαστήριον*. This power of review is said to have been the starting-point for the eventual control of the constitution by the people. The masters of the law courts became masters of the government.<sup>2</sup> The lack of precision, too, in the laws of Solon is said to have contributed to the power of the courts. The vagueness of the laws resulted in disputes regarding their meaning. They needed authoritative interpretation. In commenting on the suggestion that Solon purposely made the laws obscure, Aristotle rather pointedly remarks that it "is not just to judge Solon's intentions from the actual results in the present day, but from the general tenor of the rest of his legislation."<sup>3</sup> Aristotle was well aware of the tendency of political writers to attribute to Solon all subsequent developments of the system which he founded.<sup>4</sup>

In the *Politics*, however, Aristotle is no longer concerned with the details of the process by which the people, through control of the judiciary, controlled the state. He is interested rather in the results as exemplified in the constitution of his own time. In this spirit it is not easy for a political theorist to avoid inaccuracies. There was a natural tendency to attribute to Solon features of the judicial system that did not belong to his time. He was, after all, the founder of the system, and might in a sense be held responsible for what in succeeding generations it became, though he could not by

<sup>1</sup> *Ibid.*, iii. 5.

<sup>2</sup> *Ibid.*, ix. 1.

<sup>3</sup> *Ibid.*, ix. 2, Kenyon's translation: οὐ γὰρ δίκαιον ἐκ τῶν νῦν γιγνομένων ἀλλ' ἐκ τῆς ἄλλης πολιτείας θεωρεῖν τὴν ἐκείνου βούλησιν.

<sup>4</sup> Cf. Isocrates *Areopagiticus*, 16: τὴν δημοκρατίαν . . . ἦν Σόλων μὲν ὁ δημοτικώτατος γενόμενος ἐνομοθέτησε, Κλεισθένης δ' ὁ τοῖς τυράννοις ἐκβαλὼν καὶ τὸν δῆμον καταγαγὼν πάλιν ἐξ ἀρχῆς κατέστησεν. Also *Antidosis*, 232; and Aeschines iii. 257: Σόλωνα μὲν τὸν καλλίστοις νόμοις κοσμήσαντα τὴν δημοκρατίαν.

any possibility have anticipated the development. Consequently, for example, the reader of the *Politics* should be cautious about accepting the statement that the audit (εἶθυνα) of magistrates was in the hands of the people in Solon's time. In view of what Aristotle says in the *Constitution of Athens*, supported by considerations based on Solon's own words, this cannot be literally true.<sup>1</sup> In Greek theory and practice the administration of justice was always a very important function of government. Aristotle believed that the minimum participation in government compatible with citizenship was the right to share in deliberative and judicial functions.<sup>2</sup> So Solon, when he emancipated the lower classes economically, gave them a share in the government by allowing all who could qualify for the lowest class to be members of the popular assembly (ἐκκλησία) and the law courts (δικαστήρια). Here Aristotle uses δικαστήρια in the plural, just as the orators use it, when the jurors were actually divided into panels. But in two other passages he uses the singular as if speaking of a single body.<sup>3</sup> Plutarch<sup>4</sup> also uses the singular. The use of the singular in this connection has been remarked.<sup>5</sup> But in view of the fact that in the *Politics* Aristotle uses both singular and plural of the Solonian court of appeal, the singular may have no particular significance in the *Con-*

<sup>1</sup> Cf. *infra*, p. 164. Cf. Newman's excellent discussion of *Pol.* 1273b. 35.

<sup>2</sup> Aristotle *Pol.* 1275 a. 22: πολίτης δ' ἀπλῶς οὐδενὶ τῶν ἄλλων ὀρίζεται μᾶλλον ἢ τῷ μετέχειν κρίσεως καὶ ἀρχῆς.

<sup>3</sup> *Ath. Pol.* vii. 4, plural; ix. 2, singular twice. In the *Politics* (1273b and 1274a) the plural occurs twice and the singular once. S. B. Smith (*op. cit.*, pp. 106 ff.) has rightly protested against the view that Solon instituted a great popular tribunal consisting of a fixed number of jurymen chosen by lot from all citizens over thirty years of age who offered their services.

Grote, *op. cit.*, III, 128 ff., had argued vigorously against the view that Solon instituted the dicasteries. Upon the recovery of Aristotle's *Constitution of Athens*, it was hastily assumed that Grote's critics were justified in rejecting his theory entirely; and many scholars assumed that Solon was responsible for the main features of the democratic judicial system of the fourth century. Smith has done a good service in calling in question these extreme views. He points out that there was no need of numerous courts in the Athens of the early sixth century, nor were there enough urban inhabitants to man them.

<sup>4</sup> *Solon*, xviii.

<sup>5</sup> Gilbert, *Greek Constitutional Antiquities*, p. 139, n. 1.

*stitution of Athens.* And yet one would expect a court of appeal, particularly a popular court (*Volksgericht*), to be one, not several, bodies. The theoretical constitution of Hippodamus, described by Aristotle in the *Politics*,<sup>1</sup> and the *Laws* of Plato<sup>2</sup> provide for a single court of appeal. Solon could scarcely have anticipated a need for more than one court. And there is considerable evidence that the Solonian court of appeal was one body and that it was called *ἡλιαία*.<sup>3</sup> A client of Lysias<sup>4</sup> cites a law of Solon in which an obsolete word occurs, as follows: δεδέσθαι δ' ἐν τῇ ποδοκάκκῃ ἡμέρας πέντε τὸν πόδα, ἐὰν προστιμήσῃ ἡ ἡλιαία. Grote<sup>5</sup> questioned the genuineness of the law because Pollux had said that Solon used *ἐπαίτια* instead of *προστιμήματα*. But surely Lysias is as good an authority as Pollux. The law is now generally admitted to be genuine.<sup>6</sup> Manifestly ἡ ἡλιαία is the same body that Aristotle calls τὸ δικαστήριον.

This designation of the popular court largely supplanted *ἡλιαία* in the later period. But there are some interesting and significant survivals of the use of *ἡλιαία* and its derivatives. When Bdelycleon, in the *Wasps* of Aristophanes, opens court in the mock trial of the dog, imitating the herald, he proclaims:

εἴ τις θύρασιν ἡλιαστής, εἰσίτω.

The herald doubtless continued to use the old formula<sup>7</sup> long

<sup>1</sup> 1267b. 39: δικαστήριον ἐν τῷ κύριον, εἰς δὲ πάσας ἀνάγεσθαι δεῖν τὰς μὴ καλῶς κεκρίσθαι δοκούσας δίκας· τοῦτο δὲ κατεσκεύαζεν ἐκ τινῶν γερόντων αἰρετῶν.

<sup>2</sup> Page 767 C.

<sup>3</sup> Busolt-Swoboda (*Staatskunde*, 1151, n. 3) give a convenient list of the occurrences of the word *ἡλιαία*. Cf. Rogers' introduction to Aristophanes, *Wasps*, pp. xix ff.

<sup>4</sup> x. 16.

<sup>5</sup> *Op. cit.*, III, 128, n. 1.

<sup>6</sup> Busolt, *Geschichte*, II, 285; Busolt-Swoboda, *Staatskunde*, p. 1151, n. 3; Meyer, *op. cit.*, II, 659; Wilamowitz, *op. cit.*, p. 60, n. 1; *CAH*, IV, 56; S. B. Smith, *op. cit.*, p. 107, n. 6, rejects it mainly on the basis of the statement of Pollux and the general unreliability of the orators in matters of ancient history. But Lipsius, *op. cit.*, p. 440, n. 79, has disposed of the evidence of Pollux.

<sup>7</sup> *Wasps*, 890. Cf. use of old French *oyez, oyez*, in opening British and American courts.

after the jurors were regularly described as *δικασταί*. Religious conservatism preserved *ἡλιαία* in the curse pronounced at the opening of the assembly: *εἴ τις ἐξαπατᾷ λέγων ἢ βουλὴν ἢ δῆμον ἢ τὴν ἡλιαίαν*.

In quoting the curse, Demosthenes<sup>1</sup> is evidently reproducing the ancient formula used by the herald on these occasions, which would be quite familiar to his audience. A speaker would scarcely venture to vary the phraseology by substituting a modern for an ancient technical term. The conservatism of religion in matters of language is further illustrated in connection with the heliastic oath. The oath is regularly described as *τῶν ἡλιαστῶν ὄρκος* or *ὁ ἡλιαστικός ὄρκος*.<sup>2</sup> In the oath itself a derivative of *ἡλιαία* is found: *οὐδὲ δῶρα δέξομαι τῆς ἡλιάσεως ἕνεκα*.<sup>3</sup> Both *ἡλιαία* and its derivatives are found in Aristophanes.<sup>4</sup> This may be in part due to the conservatism of popular speech which comedy seeks to reproduce. But in most instances Aristophanes uses the words to impart an antique flavor. Thus, in an ancient comic oracle it is said that some day the Athenians will sit in court (*ἡλιάσασθαι*) at 5 obols per day.<sup>5</sup> When *ἡλιαστής* is used to designate a dicast, it is evidently intended to carry a suggestion of extreme old age, a favorite jibe of Aristoph-

<sup>1</sup> xxiii. 97.

<sup>2</sup> Hypereides *Euxenippus*, 40.

<sup>3</sup> Demosthenes xxiv. 149.

<sup>4</sup> *Knights*, 897 ff.:

ἐπίτηδες οὗτος αὐτὸν ἔσπευδ' ἀξιὸν γενέσθαι.  
 ἴν' ἐσθλοῖτ' ὠνούμενοι, κᾶπειτ' ἐν ἡλιαίᾳ  
 βδέοντες ἀλλήλους ἀποκτείνειαν οἱ δικασταί.

The scholiast understands ἐν ἡλιαίᾳ as referring to a specific court. But it means simply "in court."

<sup>5</sup> *Knights*, 798:

ἔστι γὰρ ἐν τοῖς λογίοισιν  
 ὥς τοῦτον δεῖ ποτ' ἐν Ἀρκαδίᾳ πεντῶβολον ἡλιάσασθαι,  
 ἣν ἀναμείνη·

In the *Wasps* (772) Aristophanes uses *ἡλιάσει* for *δικάσει*, as the scholiast remarks, for the sake of making a pun.

καὶ ταῦτα μὲν νυν εὐλόγως, ἣν ἐξέχη  
 εἶλη κατ' ὄρθρον, ἡλιάσει πρὸς ἥλιον.

anes.<sup>1</sup> The occurrence of *ἡλιαία* in laws cited in the speeches of Demosthenes, referring to courts other than those presided over by the thesmothetae, points to the use of the word in official documents.<sup>2</sup> The words *ἡλιαία* and *ἡλιαστής* are found in a few fifth-century inscriptions.<sup>3</sup>

When the system of appeal inaugurated by Solon was abandoned<sup>4</sup> and all cases were in the first instance tried by a popular court, a single tribunal no longer sufficed. Additional courts were created by drawing panels from the membership of the Heliæa. These sections were called dicasteries (*δικαστήρια*). But the name Heliæa survived as the designation of the court (*δικαστήριον*) presided over by the thesmothetae, which was often called *ἡ ἡλιαία τῶν θεσμοθετῶν*.<sup>5</sup> This practice was no doubt due to the fact that this court continued to assemble in the meeting place of the original body, which was called Heliæa.<sup>6</sup> The court of the thesmothetae tried some of the most important public cases. Several sections of 500 were not infrequently assembled for

<sup>1</sup> *Knights*, 255:

ὦ γέροντες ἡλιασταί, φράτερες τριωβόλου,  
οὐδ' ἐγὼ βόσκω κεκραγὼς καὶ δίκαια κᾶδικα.

*Wasps*, 195:

ἀλλ' ἴσως, ὅταν φάγῃς  
ὑπογᾶστριον γέροντος ἡλιαστικοῦ.

Cf. *Lysistrata*, 381, where it is said to an old man, ἀλλ' οὐκ ἐθ' ἡλιάξει. Lipsius (*op. cit.*, p. 150) seems to think that the name *ἡλιαστής* continued in use because the most important of the courts was called *ἡλιαία*. No doubt various motives lie back of the use of the word.

<sup>2</sup> Lipsius, *op. cit.*, p. 169, n. 12.

<sup>3</sup> *CIA*, I, 37; 266, as restored by Koehler; IV (1) 27. Hicks and Hill, *Greek Historical Inscriptions*<sup>2</sup>, No. 40, l. 75.

<sup>4</sup> Cf. *infra*, p. 195.

<sup>5</sup> Antiphon vi. 21: ἔλεξε μὲν γὰρ Φιλοκράτης οὐτοσί' ἀναβὰς εἰς τὴν ἡλιαίαν τὴν τῶν θεσμοθετῶν.

*CIA*, IV (1) 27a. Hicks and Hill, *op. cit.*, No. 40, ll. 75-76: περὶ δὲ τούτων ἔφεσιν εἶναι Ἀθῆναζε ἐς τὴν ἡλιαίαν τὴν τῶν θεσμοθετῶν κατὰ τὸ φήμισμα τοῦ δήμου.

Cf. Andocides i. 28: ἔδοξεν οὖν τῷ δήμῳ ἐν τῷ τῶν θεσμοθετῶν δικαστηρίῳ, κ.τ.λ. Hypereides *Euklepirrus*, 6: παράνομά τις ἐν τῇ πόλει γράφει θεσμοθετῶν συνέδριον ἔστι.

Caillmer, *Dictionnaire des antiquités*, s.v. "Heliæa."

<sup>6</sup> Demosthenes xlvii. 12: ἡ μὲν γὰρ δαίτα ἐν τῇ ἡλιαίᾳ ἦν.

*Lexica Segueriana*: ἡλιαία καὶ ἡλιάζεσθαι· δικαστήριον ἀνδρῶν χιλίων καὶ ὁ τόπος οὗτο δικάζουσι.

particularly important cases. On one occasion 6,000 sat in the court of the thesmothetae.<sup>1</sup> These large numbers required commodious quarters. Harpocration and Photius define *ἡλιαία* as "the largest court in Athens, consisting of 1,000 or 1,500 dicasts, in which public cases (*τὰ δημόσια τῶν πραγμάτων*) were tried."<sup>2</sup> Evidently any court that consisted of two or more sections met in the Heliæa. A twofold division of the heliastic courts into "the lesser courts" and the Heliæa is found in the fourth century.<sup>3</sup>

Grote<sup>4</sup> believed that the "original and proper meaning of the word *ἡλιαία* is 'public assembly.'" The similarity to the Doric *ἀλιαία* cannot be accidental, whatever the nature of the relationship.<sup>5</sup>

Solon emancipated the lower classes. His problem was to give them power enough to enable them to defend their political and economic rights by constitutional means. The old Homeric agora survived through the kingship and the

<sup>1</sup> Andocides i. 17.

<sup>2</sup> Harpocration, s.v. *ἡλιαία*. Aristotle *Ath. Pol.*, lxviii.

<sup>3</sup> Haupt, "Excerpte aus der Rede des Demades," *Hermes*, Vol. XIII, p. 494, excerpt 52: *ἐκαστον τῶν ἀδικημάτων ἰδίας ἔχει τὰς οἰκονομίας· ἃ μὲν γὰρ ἐστι δέδμενα τῆς Ἀρείου πάγου βουλῆς, ἃ δὲ τῶν ἐλαττόνων δικαστηρίων, ἃ δὲ τῆς ἡλιαίας.*

<sup>4</sup> Grote, III, 128, n. 1. Cf. Rogers, Introduction to *Wasps*, pp. xix-xx. The ancients made some guesses as to the derivation. Scholiast (*Knights*, 255) connects it with the word for sun (*ἥλιος*), because the assembly met in the open air. Aristophanes, *Wasps*, 772, may have suggested this derivation by his pun *ἡλιαίαι πρὸς ἥλιον*.

<sup>5</sup> The authors are indebted to their colleague, Professor C. D. Buck, for the following note on *ἡλιαία*:

The usual Doric word for public assembly is *ἀλία* as it is generally quoted, or *ἀλία* as the lack of ' in the early inscriptions indicates. Besides this, *ἀλιαία* is attested in inscriptions of Argos, Mycenae, and Arcadian Orchomenos. The initial vowel must be long, that is *ἄλία*, *ἄλιαία*, as in the related Ion. *ἄλης*, Att.-Ion. *ἄλιζω*, all derived from *ἀ-φαλ-* or *ἀ-φαλ-* (cf. Hom. *ἀλλής*, an Aeolic form with *ολ* = *αλ*), with the weak grade of the root *φελ-* (Hom. *ἐλμένοι*, 'close-packed,' etc.). The contraction of *α(φ)α* gives regularly not only Doric *ā*, but also Attic-Ionic *ā*, not *η* (cf. also *ἀνᾶλισκω* from *ἀνα-φαλίσκω*). Hence Attic *ἡλιαία* cannot be a native Attic form corresponding to Doric *ἄλιαία*. Yet to separate it from the latter, either wholly or in part (by means of a different analysis, so Solmsen, *Untersuchungen*, p. 288), is an act of violence. The most reasonable view appears to be that it is a loan word from Doric put into hyper-Attic form, that is, with substitution of *η* for *ā* after the analogy of the familiar correspondence which holds good so commonly, and possibly in this case favored by a fancied relation to *ἥλιος* (which would also explain the ' of *ἡλιαία*, so far as this is to be accepted). Cf. also Boisacq. *Dict. Étym.* c n

aristocracy.<sup>1</sup> It was unorganized and informal compared with the elaborate ecclesia of a later age, but there were possibilities in it which Solon knew from his own experience. It was before an informal gathering of the people in the market that he recited his "Salamis" with an apology for coming before them with a poem instead of a speech.<sup>2</sup> The choice of Solon as political arbitrator must have been ratified by an assembly representing the views of the discontented masses. This rudimentary body, which was doubtless called the Heliæa, Solon renewed and reorganized.<sup>3</sup> The lowest class of citizens was admitted to membership, and a Senate of Four Hundred was put in charge of the meetings. "The senate," says Plutarch, "was to deliberate in advance of the assembly and was not to permit anything to come before the assembly without previous deliberation."<sup>4</sup> It may seem that Plutarch is simply attributing to the Senate of Four Hundred the functions of the later Senate of Five Hundred. No popular assembly, however, could function effectively without organization and guidance. Without a program and chairmen it would have been a mere mob, both inefficient and dangerous.<sup>5</sup>

<sup>1</sup> Meyer, *op. cit.*, II, sec. 219. Cf. Gilbert, *Beiträge*, p. 446. De Sanctis (*op. cit.*, p. 148) believes that at first the popular assembly had the right to confirm or reject a capital sentence imposed by the Areopagus. Gradually it lost this power.

<sup>2</sup> Plutarch *Solon* viii. 2. ἐλεγεία δὲ κρύφα συνθεὶς καὶ μελετήσας, ὥστε λέγειν ἀπὸ στόματος, ἐξεπήδησεν εἰς τὴν ἀγορὰν βῆναι πιλίδιον περιθέμενος. ὄχλου δὲ πολλοῦ συνδραμόντος ἀναβάς ἐπὶ τὸν τοῦ κήρυκος λίθον ἐν ᾧ δὴ διεξήλθε τὴν ἐλεγείαν ἧς ἐστὶν ἀρχὴ

Αὐτὸς κήρυξ ἦλθον ἀφ' ἱμερτῆς Σαλαμίνος,  
κόσμον ἐπέων ᾧδὴν ἀντ' ἀγορῆς θέμενος.

<sup>3</sup> Aristotle *Ath. Pol.* xii. 4:

ἐγὼ δὲ τῶν μὲν οὐνεκα ξυνήγαγον  
δῆμον, τί τούτων πρὶν τυχεῖν ἐπαυσάμην;

Cf. Busolt-Swoboda, *Staatskunde*, p. 828.

<sup>4</sup> Plutarch *Solon*, xix. Busolt-Swoboda, *op. cit.*, p. 846, accepts Plutarch's statement but believes that the archons, like the Homeric kings, presided at meetings.

<sup>5</sup> Solon (Aristotle *Ath. Pol.* xii. 2) himself explains what he believed to be the right way of dealing with the people, "neither leaving them too free, nor subjecting them to too much restraint."

δῆμος δ' ᾧδ' ἂν ἔριστα σὺν ἡγεμόνεσσιν ἔποιτο,  
μήτε λῆαν ἀνεθεὶς μήτε βιαζόμενος.

Solon sought to establish a balanced system between the two factions.

To the common people I have given such a measure of privilege as sufficeth them, neither robbing them of the rights they had nor holding out the hope of greater ones; and I have taken equal thought for those who were possessed of power and who were looked up to because of their wealth, careful that they too should suffer no indignity.<sup>1</sup>

The Senate of Four Hundred, closely associated with the assembly, was an excellent device for maintaining the balance between the two parties. The archons were traditionally associated with the ancient aristocratic council, the Areopagus. The balance would have been disturbed had they been put in charge of the meetings of the assembly also.

To the popular assembly, representing as it did the prevailing public opinion of Athens, Solon allowed an appeal from magisterial decisions.<sup>2</sup> The experience and confidence of the upper classes were in a measure counterbalanced by the superior numbers of the lower classes. The assembly exercised both deliberative and judicial functions: in one capacity it was an assembly (*ἐκκλησία*); in the other, a court (*δικαστήριον*).<sup>3</sup> Neither Aristotle nor Plutarch has anything

<sup>1</sup> Aristotle (*Ath. Pol.* xii. 1) quotes Solon's own statement. In the *Politics* (1273b. 35 ff.) Aristotle contrasts the Areopagus and the magistrates, the oligarchic element in Solon's constitution, with the organized people exercising judicial functions.

<sup>2</sup> Aristotle *Ath. Pol.* ix. 1: ἡ εἰς τὸ δικαστήριον ἔφεσις. Steinwenter (*Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte* [München, 1925], p. 70), contrary to the accepted view, maintains that ἔφεσις does not mean "appeal" (*Appellation*) in the modern sense. Hommel ("Heliäia." *Philologus Supplementband*, XIX [1927], Heft II, 149) agrees. The arguments are not convincing. Wilamowitz, who formerly (1880) argued that there was no trace of appeal in Attic law (*Philologische Untersuchungen*, I, 89), modified his opinion in *Aristoteles und Athen* (1893), I, 59-60. While he believes that ἔφεσις εἰς τὸ δικαστήριον is "die Appellation von jedem magistratischen Urteilsspruch an das Volksgericht," he thinks it also includes a reference to a court by the magistrate himself of verdicts carrying penalties beyond his competence.

<sup>3</sup> "Per ciò elieia in origine non fu verisimilmente che un altro nome della ecclesia (*ἐκκλησία*); e poi il significato dei due termini si differenziò, l'uno passando a significare in Atene l'assemblea popolare in quanto vota leggi e decreti, l'altro l'assemblea in quanto giudica e di qui con facile passaggio, i tribunali popolari."—De Sanctis, *op. cit.*, p. 255. Adcock (*CAH*, IV, 56) rejects the idea of an appeal like the Roman *provocatio* or the Macedonian right of appeal to the army, because the Heliäia might be concerned in very trifling cases (*Lysias* x 16). "We may then sup-



to say about the chairmanship of the Heliaea. Plutarch plainly implies that the *ἐφεσις* introduced by Solon was similar to the Roman *provocatio ad populum*. In comparing Solon with Publicola, he says, "Publicola gave the defendant the right of appeal to the people as Solon to the jurors."<sup>1</sup> If this be true, there would be but slight difference between the deliberative and the judicial functions of the people. Appeals could be introduced by the *boulé*. Members of the *boulé* would preside at judicial, just as at deliberative, sessions. When the *ecclesia* itself dispensed justice in the fifth century, the *prytaneis*, drawn from the *boulé*, presided as they did at the ordinary meetings. Busolt believes that each magistrate presided at the appeal from his own decision.<sup>2</sup> Some support for this view is found in the later practice, according to which magistrates presided at the hearing of cases within their respective jurisdictions. It appears, also, that when an appeal was taken against a fine inflicted summarily by a magistrate in the later period, he presided over the court that heard the appeal.<sup>3</sup> If this be true, the practice may well be a survival from a time when all magisterial judgments were subject to appeal.

But these are not conclusive arguments. An obvious objection is that it is not to be expected that a judge would participate in any way in a review of his own judgments. But it is urged that a presiding magistrate had practically no influence on the outcome of the case. This is not strictly true in the later period.<sup>4</sup> In the time of Solon it was less

pose that the magistrates judged cases regularly with the help of a meeting of citizens. Possibly the magistrates sat on market days and their courts were attended by such citizens as had leisure." For a different explanation of the Lysias passage, see *infra*, p. 279.

<sup>1</sup> Σόλωνος καὶ Ποπλικόλα σύγκρισις, ii. τοῖς φεύγουσι δίκην ἐπικαλεῖσθαι τὸν δῆμον ὥσπερ ὁ Σόλων τοὺς δικαστάς, ἔδωκε. It is true that the Roman *ius provocationis*, or the Macedonian right of appeal to the army involved only serious offenses (cf. *CAH*, IV, 56). But the point of the comparison is not in the kind of case that was open to appeal but in the character of the court of appeal, the assembled people. Cf. Grote, *op. cit.*, III, 130.

<sup>2</sup> Busolt-Swoboda, *Staatskunde*, p. 1151.

<sup>3</sup> Cf. *infra*, p. 279.

<sup>4</sup> Lipsius, *op. cit.*, p. 55.

likely to be true. The appeal to the Heliæa was intended to give the people an opportunity to protect themselves against "crooked decisions" of the magistrates. It may be urged that Solon would not have run the risk of impairing the new measure by allowing the magistrates to participate in any way in the proceedings. Even if their participation was not prejudicial to the interests of the litigants, it might tend to arouse suspicions of Solon's *bona fides*.

The decision of the question as to the chairmanship of the Heliæa depends largely upon the organization of that body. If the personnel was the same whether it was acting as a deliberative or a judicial body, there seems to be no reason why the boulé might not furnish the presiding officers at both types of meeting. Even the administering of an oath might be managed by these officials. On the other hand, the close relationship between the thesmothetae and the heliastic courts and the retention of the name Heliæa to designate the court presided over by the thesmothetae suggests that under the Solonian system they may have presided at judicial sessions of the Heliæa. This would involve an irregularity, for the thesmothetae would preside both over their own appeals and over those of other magistrates. Perhaps the better solution is to suppose that the thesmothetae organized the Heliæa and summoned it when necessary, leaving the chairmanship to the magistrates whose judgment was being appealed. This would account for the later relationship between the thesmothetae and the heliastic courts, as well as the chairmanship of the magistrates.

There is no evidence regarding the organization and membership of the Heliæa as a court. Current theories on the subject are inferences drawn from later practice. The distinguishing characteristics of a judicial, in comparison with a deliberative, body are the oath and the secret ballot (*ψηφος*). There is no direct evidence that members of the Heliæa were sworn when they acted as judges. In later times the members of the local assemblies in the demes were sworn when they acted in a judicial or semijudicial capacity.<sup>1</sup> But the ecclesia

<sup>1</sup> Haussoullier, *La vie municipale en Attique*, p. 43.

tried cases without being sworn, though the voting was secret. However, the designation of the dicasts' oath as *δρκος ἡλιαστικός* or *δρκος τῶν ἡλιαστῶν* points to an early use of the oath in the history of the Heliaea. It cannot be later than the organization of the *δικαστήρια* in the time of Cleisthenes, and may be as early as Solon. The later practice of administering the oath to the dicasts in a body doubtless goes back to the time of Solon when the heliasts functioned as a body.

There is no mention of an age qualification in connection with the reforms of Solon;<sup>1</sup> nor is there any likelihood that there was one. In fact, according to Aristotle, it was urged by the critics of democracy that men of small means and any age were permitted to participate in the administration of justice.<sup>2</sup> A statement in Aristotle's *Politics*<sup>3</sup> is cited in support of the view that membership in the Heliaea was determined by lot. Here it is to be observed that Aristotle is quoting the opinion of critics of Solon who are interested in attributing to him all the objectionable features of democracy. It is by no means clear for what purpose the lot would be used in the opinion of these critics of Solon. Was it used to restrict the membership or to secure an adequate attendance by drafting for service those upon whom the lot fell? From the point of view of Solon, there was nothing to be gained by conferring upon the masses the minimum of political privilege and then restricting by lot or by an age qualification the number of those entitled to participate. Apparently the necessity for these restrictions came later in the history of democracy. In the beginning, numbers were desirable; they would help to create a feeling of confidence

<sup>1</sup> In the constitution attributed to Draco by Aristotle (cf. *supra*, p. 137) the members of the *βουλή* were required to be thirty years or over. In view of an age qualification of thirty for the Senate of Five Hundred under Cleisthenes, one might expect a similar qualification for the Solonian Senate, but there is no mention of it in the sources. Busolt-Swoboda (*Staatskunde*, pp. 850 and 1150 ff.) believe there was an age qualification, as does Wilamowitz (*Aristoteles und Athen*, II, 63).

<sup>2</sup> *Pol.* 1282a, 31: καὶ δικάζουσιν ἀπὸ μικρῶν τιμημάτων καὶ τῆς τυχοῦσης ἡλικίας.

<sup>3</sup> *Ibid.*, 1274a. 5. κύριον ποιήσαντα τὸ δικαστήριον πάντων, κληρωτὸν δν. Busolt-Swoboda (*op. cit.*, p. 850) reach no conclusion.

among the masses and tend to inspire respect in the minds of their opponents. The earliest reference to a fixed number of jurors—6,000—is found in Aristophanes.<sup>1</sup> The number goes back to the institution of ostracism by Cleisthenes, but beyond that there is no trace of a numerical requirement. No explanation of how the number 6,000 was selected is forthcoming. It is unlikely that there is any connection with the number in the Solonian Heliaea.

The social and economic conditions of Athens in the early sixth century make it seem very unlikely, if not impossible, that there should have been 6,000 men beyond thirty years of age available for regular service in a popular judicial assembly.<sup>2</sup> Every consideration seems to be against the assumption that there was any limitation upon attendance at the judicial sessions of the Heliaea either by an age qualification or by a maximum number.

The Areopagus continued to participate in the administration of justice in the Solonian constitution as before.<sup>3</sup> Aristotle's description of its powers is practically a repetition of what he says regarding the pre-Solonian Areopagus.<sup>4</sup> It continued to be guardian of the law and overseer of the constitution. In the exercise of these functions it had full authority to fine and otherwise to punish offenders. It still acted as *censor morum* just as before. The arbitrary manner in which it exacted fines and paid them into the treasury without specifying the offense strongly suggests the exercise of censorial powers<sup>5</sup> as well as the functions of a regular crimi-

<sup>1</sup> *Wasps*, 662. Cf. *infra*, p. 194, for a discussion of the significance of the number 6000.

<sup>2</sup> S. B. Smith, *op. cit.*, pp. 107 ff.

<sup>3</sup> It is a matter of surprise that no mention of the homicide jurisdiction of the Areopagus under Solon is found in the sources for this period. This jurisdiction is implied in the amnesty law discussed by Plutarch (*Solon*, xix), but such an ancient prerogative would seem to deserve more than a passing notice. Cf. Lipsius, *op. cit.*, p. 13.

<sup>4</sup> διατηρεῖν τοὺς νόμους (Aristotle *Ath. Pol.* iii. 6) = νομοφυλακεῖν (viii. 4). κολάζουσα καὶ ζημιούσα πάντας τοὺς ἀκοσμοῦντας = τοὺς ἀμαρτάνοντας ἡθύνειν. κυρία οὖσα = κυρίως.

<sup>5</sup> Cf. Lipsius, *op. cit.*, p. 13.

nal court. Opinion is divided as to whether the Heliaeae or the Areopagus audited the accounts of outgoing magistrates.<sup>1</sup> In two passages in the *Politics*,<sup>2</sup> Aristotle says very definitely that Solon gave to the people (τῷ δήμῳ) the right to call magistrates to account: τὸ τὰς ἀρχὰς εὐθύνειν. He is evidently using the words εὐθύνειν and εἵθυνα in the technical sense. In the *Constitution of Athens* he says that the Areopagus had the right εὐθύνειν τοὺς ἀμαρτάνοντας.<sup>3</sup> It is doubtful whether Aristotle is using εὐθύνειν in its technical sense as it is used in the preceding chapter in the spurious constitution of Draco.<sup>4</sup> The words τοὺς ἀμαρτάνοντας do not suggest magistrates presenting themselves for examination before an auditing body, but rather wrongdoers.<sup>5</sup> Εὐθύνειν, then, would be used as Solon himself uses it in the sense of "correct" or "punish."<sup>6</sup> But even if εὐθύνειν is not used in a technical sense, there is no reason for denying the competence of the Areopagus as an auditing body. It is not to be supposed that Solon devised anything like the elaborate εἵθυνα of the fourth century. The powers of the Areopagus are quite broad enough to include an adequate supervision over the official conduct of the magistrates, so that a final audit would seem unnecessary. ὥσπερ ὑπῆρχεν καὶ πρότερον ἐπίσκοπος οὖσα τῆς πολιτείας, καὶ τὰ τε ἄλλα τὰ πλεῖστα καὶ τὰ μέγιστα τῶν πολιτικῶν διετῆρει καὶ τοὺς ἀμαρτάνοντας ἡθύνεν κυρία οὖσα καὶ ζημιοῦν καὶ κολάζειν.<sup>7</sup> On the other hand, the Heliaeae possessed, in the ἐφεσις, a power to force the magistrates to administer the law impartially. This power, it is true, was exercised only occasionally and upon the initiative of some

<sup>1</sup> Busolt-Swoboda (*Staatskunde*, 847) think the audit was handled by the *Volksversammlung*, and not by the *Volksgericht*, as Aristotle intimates in the *Politics* 1274a. 15. Wilamowitz (*op. cit.*, I, 49 and 70) assigns elections and the right to suspend magistrates (ἐπιχειροτονία) to the *Volksversammlung*. But audits (εἵθυνα) came before a *Volksgericht*. Wilamowitz depicts an organization much too elaborate for Solon's time. Besides, according to Aristotle, the judicial functions of the Heliaeae were confined to appeals from the judgments of magistrates. There is no reason to doubt Aristotle's statement. Bruno Keil (*Die Solonische Verfassung*, 118 ff. and 152) thinks the Areopagus handled the audits. So also does Meyer (*op. cit.*, II, 658).

<sup>2</sup> Pages 1274a and 1281b.

<sup>3</sup> viii. 4.

<sup>4</sup> iv. 2.

<sup>5</sup> Busolt-Swoboda, *op. cit.*, p. 848, n. 1. Cf. Wilamowitz, *op. cit.*, I, 49, n. 14.

<sup>6</sup> *Elegy* 2. 37.

<sup>7</sup> Aristotle *Ath. Pol.* viii. 4.

aggrieved litigant; but, as has been observed,<sup>1</sup> the *ἐφεσις* is the germ from which the *εἵθυνα* of the later period grew. One is forced to the conclusion that the responsibility of magistrates to the community was enforced by both the Areopagus and the Heliaea. This division of authority between the two bodies that represented the two political elements in the state is quite in accordance with Solon's general policy to preserve a balance in the constitution and to permit neither party to triumph and get complete control of the government.<sup>2</sup> The same principle is followed in the matter of appeals. Only the magistrates' judgments were subject to appeal; the judgments of the Areopagus and the Ephetae continued to be final.

Regarding the technical aspect of the *εἵθυνα*, the auditing of accounts, the Areopagus would seem to be the only body in the state that could perform this service effectively.<sup>3</sup> Accounts cannot be audited by a public assembly. The *boulé* might conceivably check up the expenditures of the magistrates and present the matter to the assembly for formal action to give effect to their recommendations. But as the *boulé* itself expended money, its own accounts must be audited. The Areopagus could do this by virtue of its power to "keep watch over the most important matters in the state" (*τά τε ἄλλα τὰ πλείστα καὶ τὰ μέγιστα τῶν πολιτικῶν διετήρει*).<sup>4</sup> For the moment the Areopagus may have seemed to be much the more important factor in enforcing the magistrates' real responsibility; but it so happened that, owing to the accidents of the situation, the constitution developed along democratic lines and the people gained control of the whole administration of justice, including the *εἵθυνα*. And so in the *Politics*,<sup>5</sup> where Aristotle is not so much concerned with the process as

<sup>1</sup> Gilliard, *Quelques reforms de Solon*, p. 288.

<sup>2</sup> Solon *Frag.* 3. (Aristotle *Ath. Pol.* xii. 1.)

*νικᾷν δ' οὐκ εἶας' οὐδετέρους ἀδικῶς.*

<sup>3</sup> Cf. Wilamowitz, *op. cit.*, I, 49.

<sup>4</sup> Aristotle *Ath. Pol.* viii. 4.

<sup>5</sup> 1274a. 11 ff.: τῆς ναυαρχίας γὰρ ἐν τοῖς Μηδικοῖς ὁ δῆμος αἴτιος γενόμενος ἐφρονηματίσθη, καὶ δημαγωγὸς ἔλαβε φαύλους ἀντιπολιτευομένων τῶν ἐπικῶν, ἐπεὶ Σόλων γε εἴκοι τὴν ἀναγκαιοτάτην ἀποδίδοναι τῷ δήμῳ δύναμιν, τὸ τὰς ἀρχὰς αἰρεῖσθαι καὶ εἵθνευιν· μηδὲ γὰρ τούτου κύριος ὢν ὁ δῆμος δοῦλος ἂν εἴη καὶ πολέμιος.

the result, he does not scruple to say that the people in Solon's time conducted the audits, because the audit (*εἰθυνα*) grew out of the appeal (*ἐφεσις*) to the Heliaea, not out of the guardianship and supervision of the Areopagus.

The debt of Solon, as a law reformer, to his predecessors in the field has not been adequately recognized either by ancient historians and political theorists or by modern scholars. It seems to be felt that any such recognition detracts from Solon's greatness. But changes in human institutions are due to evolution quite as much as to inspiration. Solon's code was no exception. It did not spring from his brain like full-panoplied Athena from the brain of Zeus. An important part of it was a re-enactment of a section of Draco's code—the homicide laws. His Heliaea was a rehabilitation and reorganization of the Homeric agora. Solon's great merit lies in the fact that he adapted current practices and ancient institutions to his needs. His chief concern was to protect the people in their new economic and political freedom. The means he found to carry out his purpose were the right of appeal to an assembly of all citizens and freedom of prosecution. Precedents for both were at hand. Appeals were not explicitly recognized as such in the earlier constitution; but the guardianship of the laws vested in the Areopagus and its right to take cognizance of the failure of the magistrates to observe the laws must in some instances have involved a reversal of a magisterial verdict by the Areopagus.<sup>1</sup> If Aristotle's statement regarding the Areopagus in the Draconian system be accepted as a part of his code, dealing, as it does, with the judiciary rather than with constitutional matters, the way was opened for an appeal by anyone who had been wronged by a magistrate, either in his judicial or in his administrative capacity, provided the act complained of was contrary to law. And most "crooked decisions" are contrary to some law. Solon simply made the right of appeal explicit and extended it from the Areopagus to the assembly in pursuance of his policy of "giving the people such a measure of privilege as sufficed them." In the Heroic Age the commu-

<sup>1</sup> Cf. *supra*, p. 95.

nity, assembled in the agora, dealt effectively with individuals whose wrongful acts endangered the common safety. Such action was instinctive and spontaneous. There was no theory that certain types of wrongdoing are a menace to the community. But the germ of the idea was there. It is immaterial who had the right to summon a public meeting in such cases.

νῦν δὲ τίς ὧδ' ἡγείρε; τίνα χρεῖω τόσον ἵκει  
ἢ νέων ἀνδρῶν, ἢ οἱ προγενέστεροί εἰσιν;<sup>1</sup>

The most vigorous and forceful individual who knew the facts (ὁ βουλόμενος) would naturally be the prosecutor in these informal proceedings.

Under the aristocracy that succeeded the heroic kingship, the Council of Elders—in Athens, the Areopagus—represented the ruling class. It acted both in behalf of individuals and in behalf of the community when it fined and punished πάντας τοὺς ἀκοσμοῦντας. The virtual prosecutor of an offender before the Areopagus would be any member of the body who became aware of the wrongdoing. At first, an individual who might suffer by a wrongful act could not himself prosecute the offender; he could achieve his purpose only by bringing the matter to the attention of a member of the Areopagus. It was not until the reforms of Draco that he was guaranteed the right to appear before the Areopagus and prosecute the magistrate who wronged him.<sup>2</sup>

At first there was no interference by the community in cases of homicide. It was not until the notion that the shedding of blood involved pollution that the state stepped in and protected its members by ascertaining who was guilty and by insisting upon purification or punishment. But trials for homicide still continued to be classed as private suits; only the relatives could prosecute. But once the murderer went into banishment, either voluntarily or as the result of the sentence of a court, any citizen (ὁ βουλόμενος) could take action if he returned from exile unlawfully. The homicide had thus become a menace to the community. The state acted through the agency of the man who haled the exile

<sup>1</sup> Homer *Odyssey* ii. 28-29.

<sup>2</sup> Aristotle, *Ath. Pol.* iv. 4.



before a magistrate and secured his conviction for being unlawfully upon Attic soil. The exclusive rights of the relatives of the victim to prosecute lapsed. The exile was not tried as a murderer. He was guilty of a new offense against the community. But if, instead of haling the exile before the authorities, the citizen who recognized him extorted blackmail by threats or torture, quite a different situation arose. The exile, being polluted, could not go into court and collect the damages provided by law. If this provision of the Draconian code was to be enforced, obviously it must be done by *ὁ βουλόμενος*. Here are exact precedents for the *ἐξεῖναι τῷ βουλομένῳ* of Solon.<sup>1</sup> These cases are on all fours with a type of case which Solon must have contemplated with some concern. How could the law against selling children or debtors into slavery be enforced? The adult victims, in whom alone, under the traditional practice, the right of action was vested, being deprived of their liberty, were unable to secure redress. The parents of the children sold into slavery for debt, being parties to the wrong, would naturally refuse to appear in court as the legal representatives (*κύριοι*) of the wronged children. Similarly the enslaved debtor, being deprived of his liberty, was unable to institute legal proceedings to regain his freedom. The natural solution was to follow the code of Draco and permit the intervention of a third party when the victim of a wrong was unable to take action in his own behalf. Solon was thoroughly familiar with the Draconian code, as is shown by his re-enactment of the homicide laws as part of his own code. Both Aristotle<sup>2</sup> and Plutarch<sup>3</sup> have stated the prescription of Solon permitting freedom of prosecution in a way that seems to limit its application to cases where some individual was injured. But there are laws attributed to Solon dealing with matters that affect the community without touching any particular individual. Men plotting the overthrow of the government

<sup>1</sup> Cf. *supra*, pp. 120 ff.

<sup>2</sup> *Ath. Pol.* ix. 1: *ἔπειτα τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων.*

<sup>3</sup> *Solon*, xviii: *καὶ γὰρ πληγέντος ἑτέρου καὶ βιασθέντος ἢ βλαβέντος ἐξὴν τῷ δυναμένῳ καὶ βουλομένῳ γράφεσθαι τὸν ἀδικοῦντα καὶ διώκειν.*

wronged no particular individual. Their offense affected the entire community. Sumptuary laws also were aimed at practices that harmed the community only remotely and the individual citizen not at all.<sup>1</sup> Without the volunteer prosecutor these and similar laws could not have been enforced.

Solon took steps to protect the constitution by making more explicit the traditional jurisdiction of the Areopagus over those accused of high treason in the broadest sense of the words. He specifically empowered the Areopagus to try those accused of plotting to overthrow the constitution.<sup>2</sup> This provision is called *νόμος εισαγγελίας*. No one is injured more than another by the subversion of a constitution; the community itself is injured. Consequently the only available accuser is the volunteer representative of the community, *ὁ βουλόμενος*. Just as the right of appeal and freedom of prosecution afforded protection to the individual who was wronged, so the *νόμος εισαγγελίας* secured the same benefits to the state by granting freedom of prosecution when its security was threatened by plots and violence.

In a new constitution, which was not wholly acceptable to the classes from which the higher magistrates were drawn, it was desirable to take precautions to prevent them from destroying the new system by refusing to give effect to the laws. Solon attempted to deal with this danger by requiring the archons to take an oath not to transgress the laws, on pain of offering a golden statue.<sup>3</sup> If any serious attempt was made to enforce such an oath, or rather to punish its transgression, the Areopagus alone was capable of doing it. It could act either on its own initiative or on complaint of any aggrieved citizen who claimed that the archon's failure to observe a particular law had injured him.

It is clear that Solon believed that the community might

<sup>1</sup> *Ibid.*, xxi. 4-5.

<sup>2</sup> *Ath. Pol.* viii. 4: καὶ τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν, Σόλωνος θέντος νόμον εισαγγελίας περὶ αὐτῶν.

<sup>3</sup> Aristotle, *op. cit.*, vii. Regarding the statue, cf. Sandys' note. The oath in Aristotle's day referred to bribes as well as to transgressions of the law: *ὁμνίουσιν δίκαιως ἄρξαι καὶ κατὰ τοὺς νόμους, καὶ δῶρα μὴ λήψεσθαι τῆς ἀρχῆς ἕνεκα, κἂν τι λάβωσι ἀνδρίαντα ἀναθήσειν χρυσοῦν* (*ibid.* lv. 5.)

be injured in the person of one of its members. Aristotle<sup>1</sup> quotes him as saying, "I brought the people together" (*συνήγαγον δῆμον*). The word *συνάγω* means more than to assemble the people; it means rather that he organized the people into a political body with definite functions. An inevitable and, from Solon's viewpoint a desirable, result of such a rehabilitation of the old popular assembly would be the creation of a feeling of solidarity and mutual interdependence in the minds of the masses. The freedom of prosecution afforded a means of expressing and encouraging this feeling. Solon's conception of the rôle of *ὁ βουλόμενος* appears in a saying of his reported by Plutarch: "For the greater security of the weak commons Solon gave a general liberty of indicting for an act of injury, . . . intending by this to accustom the citizens like members of the same body to resent and be sensible of one another's injuries."<sup>2</sup> He quotes as his authority, not Solon's poetry, but his reply to one who asked him what kind of city was best. "That city is best," said Solon, "in which those who are not wronged are as zealous in prosecuting and punishing wrongdoers as those who are wronged." The simile of the body shows clearly that Solon was acting on the conviction that injuries inflicted upon individuals might be harmful to the community.<sup>3</sup> The status of *ὁ βουλόμενος* under Solon's law is that of a volunteer public prosecutor administering criminal law. Solon's great service was not the introduction of a new device for administering justice, but the formulation and application of a new principle, viz., that certain classes of offenses against individuals, which had hitherto been left to the victim to redress, were dangerous to the community and should be punished by someone acting for the community.

The use of *γραφή* to designate a public, as distinguished from a private, suit (*δίκη*) points to an earlier, or at least a different, employment of writing in connection with public suits. The practice of recording judgments and verdicts was

<sup>1</sup> *Ath. Pol.* xii. 4.

<sup>2</sup> *Solon*, xviii, Clough's translation.

<sup>3</sup> Compare the fable told by Menenius Agrippa to the seceding Roman plebs (*Livy* ii. 32. 7).

introduced by the thesmothetae.<sup>1</sup> The amnesty law of Solon shows that in certain cases records of judicial decisions were kept. They included both private and public cases, viz., homicide and tyranny. Under the Solonian system of appeals it would seem necessary to have a record of all decisions, whether in public or in private suits. A court of appeal could not function satisfactorily without such records. In the matter of recording judgments, then, no distinction between public and private suits can be drawn on the basis of the use of writing. A fundamental distinction between private and public suits is the appearance of a third party (*ὁ βουλόμενος*) in the latter. It is possible that this factor led to the requirement of a written notation of public suits by the magistrates at their inception. The judgment in a civil suit involving only the two parties concerned as plaintiff and defendant might contain a sufficient record of all the pertinent facts; whereas in public suits, particularly in case of appeal, it might be highly desirable, if not necessary, to record the name of the prosecutor when the suit was instituted. Such a preliminary notation by the magistrate might very well have served to attach the name *γραφή* to a public suit.<sup>2</sup>

Aristotle<sup>3</sup> reports the Solonian prescription allowing freedom of prosecution in very general terms: *τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων*. The words suggest acts of violence and punishment. Plutarch's<sup>4</sup> examples of the wrongs Solon had in mind are far from enlightening. They all involve violence: *καὶ γὰρ πληγέντος ἐτέρου καὶ βιασθέντος ἢ βλαβέντος ἐξῆν τῷ δυναμένῳ καὶ βουλομένῳ γράφεσθαι τὸν ἀδικοῦντα καὶ διώκειν, ὁρῶς ἐθίζοντος τοῦ νομοθέτου τοὺς πολίτας ὥσπερ ἐνὸς μέρους συναισθάνεσθαι καὶ συναλγεῖν ἀλλήλοις*. It is doubtful if Plutarch had in mind specific forms of action<sup>5</sup> such as *δίκη αἰκείας*, *δίκη βιαιῶν*, and *δίκη βλάβης*, and perhaps a criminal action

<sup>1</sup> Cf. *supra*, p. 85.

<sup>2</sup> Cf. Calhoun, *Criminal Law*, pp. 104 ff. Aristotle (*Ath. Pol.* viii. 4) assumes the use of writing in recording judgments when he says that the Areopagus inflicted fines and paid them into the treasury without recording the charge (*οὐκ ἐπιγράφουσα τὴν πρόφασιν*).

<sup>3</sup> *Ath. Pol.* ix. 1.

<sup>4</sup> *Solon* xviii. 5.

<sup>5</sup> Calhoun, *op. cit.*, pp. 73 ff.

for assault, *γραφὴ ὕβρεως*. Plutarch<sup>1</sup> cites a law of Solon providing a fine of 100 drachmas for the rape of a free woman: *ἐὰν δ' ἀρπάσῃ τις ἐλευθέραν γυναῖκα καὶ βιάσῃται, ζημίαν ἑκατὸν δραχμὰς ἔταξεν*. The word *βιάσῃται* suggests a *δίκη βιαίων*<sup>2</sup> which was used in cases of indecent assault upon either men or women or forcible seizure of a slave. For injuries to the person, redress was sought by means of a *δίκη αἰκείας*,<sup>3</sup> the ordinary action for assault. For damages to property, a *δίκη βλάβης*<sup>4</sup> was available. The word *πληγέντος* suggests bodily injury, and *βλαβέντος* may very well refer to damages to property. These are all civil (private) suits. The criminal action for assault was *γραφὴ ὕβρεως*. But this was available only in cases of "aggravated assault." There must be proof of maliciousness and intent to bring shame and disgrace upon the victim.<sup>5</sup> Whatever may have been the form of Solon's prescription, the words *τῷ βουλομένῳ* must have appeared. This is obvious from the popular use of the words. Aristophanes in the *Plutus*<sup>6</sup> represents a sycophant as seeking to put his occupation on a high plane by describing himself as *ὁ βουλόμενος*, an essential agent in the administration of law. And the orator Hypereides,<sup>7</sup> in making a plea for the right of advocates to appear on behalf of fellow-citizens, likens the service to that performed by Solon's *ὁ βουλόμενος*. One would expect such a well-known prescription to appear in the code in a form that would challenge attention, such as a separate law listing the offenses or giving a definition of the type of offense in which *ὁ βουλόμενος* could act. But, as has been pointed out,<sup>8</sup> this would amount to giving a definition of "crime," a rather unlikely venture in the seventh century. The only alternative is a general prosecution clause in every law providing punishment for acts of commission or omission.

<sup>1</sup> Solon, xxiii. Cf. Soudhaus, *De Solonis legibus*, p. 47.

<sup>2</sup> Lipsius, *op. cit.*, pp. 637 ff.

<sup>3</sup> *Ibid.*, pp. 643 ff.

<sup>4</sup> *Ibid.*, pp. 652 ff.

<sup>5</sup> Aristotle *Rhetoric* i. 13. 10; cf. Kennedy, *Demosthenes' Orations*, III, 73; Lipsius, *op. cit.*, p. 425.

<sup>6</sup> 918.

<sup>7</sup> *Eux.* 11. 8.

<sup>8</sup> Calhoun, *op. cit.*, p. 75.

In Anglo-American law criminal proceedings are no bar to a civil suit in the same matter. In Athens a choice was allowed an injured party between a civil and a criminal remedy in some cases. Familiar examples are theft and assault. But the plaintiff could not avail himself of both remedies. Under the later practice the volunteer prosecutor must choose the *γραφή*. And in the time of Solon, even if the public suit was not specifically designated *γραφή*, the situation could not have been materially different. Action by a volunteer would serve to extinguish the victim's right of action. In the *Meidias* case, Demosthenes had a choice between a civil suit (*δίκη αἰκείας*) and a criminal action (*γραφὴ ὑβρεως*). He chose the latter and acted in behalf of the community just as any volunteer prosecutor might have done. In some few cases the intervention of the volunteer accuser involved the loss of the right of the victim to collect damages. But as Demosthenes<sup>1</sup> observes, "the lawgiver considered that the aggressor injured the state as well as the insulted party, and that the punishment was a sufficient compensation to the sufferer."

Solon was responsible for an important innovation in the official use of oaths in litigation. When neither parole nor documentary evidence was available, the magistrate was empowered to administer oaths to both parties. *δοξασταὶ κριταὶ εἰσιν οἱ διαγιγνώσκοντες πότερος εὐορκεῖ τῶν κρινομένων. κελεύει γὰρ Σόλων τὸν ἐγκαλούμενον, ἐπειδὰν μήτε συμβόλαια ἔχῃ μήτε μάρτυρας, ὀμνύναι, καὶ τὸν εὐθύνοντα δὲ ὁμοίως.*<sup>2</sup> This law has given rise to much discussion. The word *κελεύει* in the version given by the lexicographer seems to indicate that *both* parties *must* take the oath. And a similar impression is conveyed by the general tenor of the definition. On the assumption that both parties were sworn, Rohde<sup>3</sup> advanced the theory that the oaths were not juristic but religious. The intention of the lawgiver was to insure divine punishment for those who escaped human punishment. An obvious objection to this view is that it does not explain

<sup>1</sup> xxi. 45, Kennedy's translation.

<sup>2</sup> *Lexica Segueriana*, Bekker, *Anecdota Graeca*, I, 242.

<sup>3</sup> *Psyche*, I, 268, n. 2.

why the oaths were restricted to cases in which there was no evidence.<sup>1</sup> Hirzel<sup>2</sup> advances his theory on the basic contention that in the absence of evidence the parties are the only source of information. Being naturally prejudiced witnesses, they were sworn so that they might have impressed upon them the necessity of being careful to tell the truth in answer to the magistrate's questions. An objection to this view is that it emphasizes too much the rôle of parties as witnesses. In later practice a party was not permitted to give testimony in his own behalf. Two types of party oath were in use before the legislation of Solon—the solemn oaths sworn by both parties in homicide trials<sup>3</sup> and the ancient evidentiary oath.<sup>4</sup> The latter was originally voluntary and extra-judicial. It was an exculpatory oath offered by, or tendered to, an accused person. Eventually someone conceived the idea of allowing the plaintiff the opportunity of taking an evidentiary oath also. Plato ascribes this change to the mythical Rhadamanthus. Observing that the men of his day manifestly believed in the gods, he conceived the idea of making the gods rather than men the judges of cases in the following manner: "Tendering an oath to the litigants regarding the matters at issue in each case he secured a speedy and reliable verdict."<sup>5</sup> The method of Rhadamanthus was simple. He gave both parties the opportunity of

<sup>1</sup> Gilbert, *Beiträge*, p. 466; Hirzel, *Der Eid*, p. 128, n. 2.

<sup>2</sup> "Daher wird auch Solon in den Fällen, in welchen keine Documente vorhanden waren, beide Parteien haben schwören lassen, damit sie in ihren Aussagen über den Thatbestand desto sorgsamer wären und nur genau so viel sagten, als sie darüber zu wissen glaubten; die Aussagen der Parteien vertraten in solchen Fällen gewissermassen die der Zeugen und auch ihre Vereidigung mag deshalb demselben Zweck gedient haben wie die von Zeugen." Sondhaus (*op. cit.*, p. 58) agrees with Hirzel.

<sup>3</sup> These oaths have every appearance of being very ancient, though they are not mentioned in the fifth-century fragment of Draco's code. Cf. Gilbert, *Greek Constitutional Antiquities*, p. 386; Lipsius, *op. cit.*, p. 833.

<sup>4</sup> For the history of the evidentiary oath, see Gertrude Smith, "The Evidentiary Oath and Oathhelpers," *The Administration of Justice from Hesiod to Solon*, pp. 55 ff.

<sup>5</sup> Plato *Laws*, 948b. The words *διδούς . . . ἕρκον τοῖς ἀμφισβητοῦσιν* do not mean "made the two parties take an oath" (Jowett) or "administered an oath" (Bury).

taking the oath, being confident that one would refuse through fear of divine vengeance. The other would take the oath and win the case.

But in the sixth century the matter could not be quite so simple. There were always some men ready to perjure themselves, but it is only reasonable to suppose that a considerable number of litigants, when faced with the issue, would shrink from taking a false oath. The justification for the law of Solon was the reasonable expectation that in a considerable number of cases a just verdict could be based upon the refusal of one of the litigants to take the oath. If both took the oath, the case would be in no wise prejudiced, and the magistrate would have the advantage of observing the demeanor of the litigants under the ordeal of taking an oath. Without a copy of the law or any indication of the content of the oath, it is difficult to discover the nature and purpose of the law. It would be extremely helpful to know, for example, whether the litigants were required to swear that they had told the truth in their pleadings or that in their answers to questions during the progress of the inquiry they would tell the "whole truth and nothing but the truth," as Hirzel believed. But it seems better to interpret the law as an attempt on the part of Solon to advance the administration of justice by authorizing the magistrate to administer an evidentiary oath, which up to his time could be employed only by consent of both parties, and to base his verdict upon it. Thus interpreted, Solon's experiment is an important step in the development of the evidentiary oath into the regular party oath in fifth- and fourth-century practice. Antiphon's<sup>1</sup> use of the word *δοξασται* shows that they are not special judges. The magistrates, instead of being "judges of the evidence" (*δικασται τῶν μαρτύρων*), became "surmisers of the truth" (*δοξασται τῶν ἀληθῶν*).

Out of Solon's use of the evidentiary oath in time grew the preliminary party oaths of later developed practice. Each party, in every case without regard to the evidence in the case, swore to the truth of his pleadings. Various opin-

<sup>1</sup> v. 94.



ions regarding the purpose and significance of these preliminary oaths have been expressed.<sup>1</sup> Plato is quite outspoken in his condemnation of a practice that forced one-half of the litigants of Athens to take a false oath. In the *Laws*<sup>2</sup> he proposed that all party oaths be abolished. "Since men's opinions about the gods have changed the laws ought to be changed." The most reasonable view seems to be that the party oath introduced by Solon for a certain type of case was extended to include all cases alike in the hope that it might act as a check upon the prosecution of unfounded claims and charges. In this connection a fragment of Sophocles<sup>3</sup> has been aptly quoted:

ὄρκου δὲ προστεθέντος ἐπιμελεστέρα  
 ψυχὴ κατέστη· δισσὰ γὰρ φυλάσσεται  
 φίλων τε μέμψιν κείς θεοὺς ἀμαρτάνειν.

In the end the party oath became a mere formality analogous to the plea of "not guilty" in a modern court.<sup>4</sup>

The right of appeal and freedom of prosecution were well calculated to insure the punishment of offenders. The rich and the powerful could not hope to escape prosecution by bribing or threatening their victims. Any citizen could take the initiative and prosecute them. Neither could they escape conviction by collusion with a magistrate in sympathy with the upper classes, for the case could be appealed to a numerous body where the members of the *demos* predominated. Thus the masses had in their own hands adequate means of securing justice for one of their number against powerful wrongdoers, or magistrates who gave "crooked decisions." Any citizen was a potential prosecutor, and every citizen was a member of the court of appeal. In the absence of records of litigation under the Solonian system, it is difficult

<sup>1</sup> Cf. Meyer, Schoemann, Lipsius, *Der attische Process*, p. 889; Gilbert, *Beiträge*, pp. 464 ff.; Lipsius, *Das attische Recht*, p. 833. Party oaths are found elsewhere in Greece. Gilbert, *op. cit.*, p. 466, n. 2, for specific instances.

<sup>2</sup> 984d.

<sup>3</sup> Frag. 431 (Nauck), cited by Hirzel, *op. cit.*, p. 134, n. 4.

<sup>4</sup> It should be remembered that in a number of cases where the issues are complicated or the interpretation and application of a law is involved, opposing claims may be quite properly urged without any dishonest purpose. In such cases a litigant is not really forsworn. Cf. Philippi, *Der Areopag*, p. 92.

to get even an approximate idea of the proportion of cases appealed. Plutarch<sup>1</sup> says in effect that there were relatively few appeals. "In the beginning the participation of the lower class in the administration of justice was of no account, but afterwards it proved to be of the greatest importance, for the majority of disputes came before the dicasts." Plutarch is obviously referring to the later period when he says that the dicasts tried the most of the cases. But his next statement<sup>2</sup> is confusing. He connects this great activity of the dicasts with the provision for appeals from the decisions of magistrates. This is true only in the sense that Solon's measure was the first step in a constitutional development that resulted in complete popular control of the courts. In itself it was of relatively little moment, but it was the beginning of great things.

Aristotle's comment on the effect of the right of appeal is less explicit. "It is by means of this [the institution of the appeal to the law court, *ἐφέσις*], they say, that the masses *have gained strength* [*ισχυκέσαι*] most of all, since, when the democracy is master of the ballot it is master of the constitution." The use of the perfect tense (*ισχυκέσαι*) shows that he is referring to the results of Solon's prescription as exhibited in the fourth-century constitution. Some misapprehension of the situation in the time of Solon has resulted from Aristotle's discussion of the alleged obscurity of his laws. "Moreover, since the laws were not drawn up in simple and explicit terms, disputes inevitably occurred and the courts had to decide in every matter, whether public or private."<sup>3</sup> Here, again, Aristotle has in view not the situation under the Solonian constitution but the conditions in the fifth and fourth centuries, when the masses (*τὸ πλῆθος*) controlled the government. He makes this clear immediately. In reject-

<sup>1</sup> *Solon*, xviii. Cf. Vinogradoff, *op. cit.*, p. 77.

<sup>2</sup> *Loc. cit.*: καὶ γὰρ ὅσα ταῖς ἀρχαῖς ἔταξε κρίνειν, ὁμοίως καὶ περὶ ἐκείνων εἰς τὸ δικαστήριον ἐφέσεις ἔδωκε τοῖς βουλευμένοις.

<sup>3</sup> *Ath. Pol.* ix. 1; Plutarch *Solon*, xviii: λέγεται δὲ καὶ τοὺς νόμους ἀσαφέστερον γράψας καὶ πολλὰς ἀντιλήψεις ἔχοντας αὐξῆσαι τὴν τῶν δικαστηρίων ἰσχύν· μὴ δυναμένους γὰρ ὑπὸ τῶν νόμων διαλυθῆναι περὶ ὧν διεφέροντο συνέβαιναν αἰεὶ δεῖσθαι δικαστῶν καὶ πᾶν ἄγειν ἀμφισβήτημα πρὸς ἐκείνους, τρόπον τινὰ τῶν νόμων κυρίους ὄντας.

ing the view that "Solon deliberately made the laws indefinite in order that the final decision might be in the hands of the people," he observes, "we must judge his intentions, not from the actual results in the present day, but from the general tenor of the rest of his legislation."<sup>1</sup> Moreover, the plain implication of Aristotle's statement that the courts had to decide in every matter, whether public or private, is to the same effect. It is to be observed that there is no reference to the intervention of the magistrates in the process. And yet they must have settled a number of the disputes that arose from a failure to understand the laws. One of the reasons why Solon left Athens was to escape the importunities of citizens who came to criticize or to ask questions,<sup>2</sup> "for he did not think it right that he should stay and interpret the laws." No magistrate could interpret the laws with the same authority as the legislator himself; but a number of honest men must have had their difficulties cleared up satisfactorily by the magistrates whose business it was to try to understand and apply the law. The constant recourse to private arbitration in all periods and the efficiency of the public arbitrators instituted at the end of the fifth century would seem to indicate that the Solonian magistrates must have satisfied a considerable number of litigants and achieved final settlements. Aristotle's failure to mention the magistrates in this connection shows that he is referring to the time when they had ceased to give final judgment and merely prepared cases for trial.

There are other considerations that support the conclusions drawn from Aristotle and Plutarch regarding the infrequency of appeals. Each litigant was normally required to present his own case.<sup>3</sup> This was not serious in a magistrate's

<sup>1</sup> *Ath. Pol.* ix. 2: οὐ γὰρ δίκαιον ἐκ τῶν νῦν γιγνομένων ἀλλ' ἐκ τῆς ἀλλης πολιτείας θεωρεῖν τὴν ἐκείνου βούλησιν.

<sup>2</sup> *Ibid.*, xi.

<sup>3</sup> For the evidence for the fifth-century practice, compare Quintilian ii. 15. 30. The rule requiring each litigant to handle his own case is generally believed to have been in force in the time of Solon. This is a reasonable view. The rule is a survival from a time when a man had to rely upon himself. If a blow was to be struck or a word said in his defense, he himself had to act. Friends might aid, but he had to take the initiative.

court, but many a litigant must have shrunk from appearing before the Heliaea. The average Athenian citizen had no experience in public speaking. Oratory as an art was unknown. He could not learn to speak except in the hard school of experience. Even in the later period when all the resources of formal rhetoric were available, many a litigant found the appearance before a dicastery to be an ordeal. The average citizen would need a strong incentive to induce him to carry an appeal to a mass meeting of his fellow-citizens. Normally, only the conviction that he had been the victim of gross injustice would be a sufficient inducement.

There was, it seems, a provision that in certain criminal cases an unsuccessful appeal might bring a larger penalty. A client of Lysias<sup>1</sup> cites a law of Solon which empowered the Heliaea to inflict an additional penalty of confinement in the stocks for five days. The nature of the offense is not specified, but from a passage in Demosthenes<sup>2</sup> it may be inferred that it was larceny. As the Heliaea had no original jurisdiction in the Solonian system, the case must have come before it by way of appeal. In the time of the orators, appeals to the heliastic courts from the decision of a deme assembly in a citizenship case were discouraged by a provision that the unsuccessful appellant be sold as a slave.<sup>3</sup> Similarly, appeals from the finding of an auditing committee to the deme assembly were discouraged by the imposition of an additional penalty in case of failure.<sup>4</sup> Modern legal systems have similar provisions. The English court of appeal in criminal cases is empowered to increase the penalty if it confirms the verdict of the lower court.

Civil suits could not be treated in this fashion. There is no indication that the practice of imposing a penalty for

<sup>1</sup> X. 16: δεδέσθαι δ' ἐν τῇ ποδοκάκῃ ἡμέρας πέντε τὸν πόδα, ἐὰν προστιμήσῃ ἡ ἡλιαία. Wilamowitz, *Aristoteles und Athen*, I, 60, takes a different view. He thinks that when a magistrate imposed a penalty beyond a specified limit, he must refer his verdict to a popular court. This, Wilamowitz regards as one aspect of ἐφεσις εἰς δικαστήριον.

<sup>2</sup> Demosthenes xxiv. 105. Cf. Lipsius, *op. cit.*, p. 440, n. 79; *CAH*, IV, 56.

<sup>3</sup> Isaeus, xii.

<sup>4</sup> Haussoullier, *La vie municipale en Attique*, pp. 80 ff.

failure to obtain a fifth part of the votes goes back to Solon. In general, it would be natural for litigants to venture upon an appeal only where the issue involved a considerable sum of money or was likely to arouse popular interest. Such are cases involving estates and heiresses.<sup>1</sup>

<sup>1</sup> Cf. Aristotle, *op. cit.*, ix. 2: *ἔτι δὲ καὶ διὰ τὸ μὴ γεγράφθαι τοὺς νόμους ἀπλῶς μηδὲ σαφῶς, ἀλλ' ὥσπερ ὁ περὶ τῶν κλήρων καὶ ἐπικλήρων, ἀνάγκη πολλὰς ἀμφισβητήσεις γίνεσθαι καὶ πάντα βραβεύειν καὶ τὰ κοινὰ καὶ τὰ ἴδια τὸ δικαστήριον.* Cf. Aristophanes *Wasps*, 583 ff.

## CHAPTER VI

### THE RULE OF THE PEISISTRATIDAE

The materials for reconstructing the history of the period between Solon and Peisistratus are very meager.<sup>1</sup> Party struggles broke out afresh in the fifth year after the archonship of Solon. The archonship was the bone of contention. In two different years no archon was elected. They are known as years of "anarchia." Then Damasias made a bid for tyranny by continuing to hold the archonship for one year and two months beyond his term of office. This threat of tyranny brought a compromise whereby five eupatrids, three georgoi, and two demiurgoi were elected archons.<sup>2</sup> This compromise involved at least a partial modification of the Solonian classification. The citizens were distributed on the basis, not of wealth, but of birth or occupation. The impoverished eupatrid who had fallen into the third class was enabled to resume his place among the nobles. The change in terminology merely indicates the political realignment. Three parties grew up. They were composed of (*a*) those who were satisfied with the Solonian constitution, (*b*) those who wished the pre-Solonian aristocracy to be restored and strengthened, and (*c*) those who thought Solon had not gone far enough in meeting the desires of the masses. Their main interest was economic rather than political, but it was only by political action that their desires could be realized.

The time was ripe for tyranny. Solon had been criticized by the masses (*πολλοὶ καὶ φαῦλοι*)<sup>3</sup> for not availing himself of the opportunity of making himself tyrant as others had

<sup>1</sup> Aristotle, *Ath. Pol.*, xiii.

<sup>2</sup> Different theories have been advanced to explain the ten archons. Busolt (*Geschichte*, II, 302) thinks seven thesmothetae were elected. Adcock in *CAH*, IV, 60, says: "The most natural assumption is that these ten archons were chosen to govern in turn during the ten months that remained of Damasias' last year of office."

<sup>3</sup> Plutarch *Solon*, xv.

done, notably in Euboea and Mytilene.<sup>1</sup> The lower classes favored tyranny because they saw in it some prospect of protection against the aristocracy. Cylon had failed because he aroused no enthusiasm in the masses. But Solon had shown what a strong man could achieve in the interests of the submerged masses. Perhaps Damasias was able to hold the archonship as representative of the radical element in the population. At any rate Peisistratus gained the tyranny with the backing of the common people. Democracy was progressing. The assembly which voted Peisistratus a bodyguard was still a vital part of the constitution.<sup>2</sup>

On the whole the Solonian laws and constitution remained. Peisistratus kept the form of the constitution and professed to administer the laws. When the tyrants were finally driven out, after fifty years, the laws had still sufficient vitality to be again put in force.

It is not known how the system of Solon fared during the period of anarchy and strife. The judicial reforms of Solon were not fundamental. He did not institute a new judiciary; he simply *permitted* freedom of prosecution and appeal. Justice could be administered as before without appeal and without the intervention of *ὁ βουλόμενος*. The excellence of his reforms lay in the fact that the mere possibility of an appeal acted as a warning to the magistrate. The voluntary prosecutor was an alternative. If the victim of a wrong himself acted, there was no need of the intervention of another. The popular assembly did continue to be an active body, as the part it played in connection with Peisistratus shows. It listened to his appeal for personal protection and gave him a bodyguard. In the years of anarchy the administration of justice must have been partially suspended. But the Athenian habit of resorting to arbitration would enable them to deal with pressing matters. The prestige and experience of the Areopagus no doubt enabled that body to carry the state through the periods of anarchy and disturbing party struggles. It may be this period that Aristotle had in mind when he said of the Areopagus: *καὶ τὰ τε ἄλλα τὰ πλεῖστα καὶ τὰ*

<sup>1</sup> *CAH*, IV, 57; Plutarch, *op. cit.*, xiv.

<sup>2</sup> *Ath. Pol.* xiv. 1.

μέγιστα τῶν πολιτικῶν διετήρει.<sup>1</sup> As the Areopagus is active as a homicide court under Peisistratus, it must have been active in the previous period.

Peisistratus seized the government of Athens by force (561–60 B.C.), but chose to rule “constitutionally” (πολιτικῶς) rather than “despotically”<sup>2</sup> (τυραννικῶς). He took care, however, that the chief offices should be held by his relatives and adherents,<sup>3</sup> and adopted measures to keep the people busy and contented “in order that they might have neither the desire nor the leisure to attend to public affairs.” According to Greek notions, “public affairs” (τὰ κοινά) included the administration of justice. No tyrant, be he never so inclined to govern “according to the established laws,” could safely permit a popular assembly to review the decisions of magistrates who represented him rather than the people. He could easily dispense with judicial sessions of the Heliaea by withdrawing the right of appeal and restoring to the magistrates whom he controlled the power “to decide cases finally on their own authority.”<sup>4</sup> He ran little risk in allowing magistrates and judicial officers who were practically his own appointees to administer justice. Indeed, it has been suggested that he strengthened the hands of the magistrates to offset the opposition of the Areopagus, which was the center of hostility.<sup>5</sup> It is quite possible that Peisistratus in the interests of the people from whom he drew considerable support, himself informally reviewed verdicts that worked injustice. The knowledge that Peisistratus kept in touch with their official acts, whether administrative or judicial, would have a salutary effect upon the magistrates. The vicissitudes of Peisistratus’ career as tyrant show that there was constant need of the utmost vigilance on his part. His interest in the administration of justice is shown by his habit of going about the country districts “settling disputes”: καὶ αὐτὸς ἐξέηι πολλάκις εἰς τὴν χώραν, ἐπισκοπῶν καὶ διαλύων τοὺς διαφερομένους.<sup>6</sup> The words διαλύων τοὺς διαφερομένους at once

<sup>1</sup> *Ibid.*, viii. 4.

<sup>4</sup> Aristotle *Ath. Pol.* iii. 5.

<sup>2</sup> *Ibid.*, xvi. 2.

<sup>5</sup> Calhoun, *Criminal Law*, p. 96.

<sup>3</sup> Thucydides vi. 54.

<sup>6</sup> Aristotle *Ath. Pol.* xvi. 5.



suggest arbitration. Naturally he would first endeavor to compose quarrels and disputes before rendering a verdict on the merits of the case and enforcing it by his authority as tyrant. His experiences on these occasions no doubt suggested to him the idea of furthering his policy of keeping the people on their farms by appointing justices to go on circuit throughout the village communities.<sup>1</sup> The cases that came before them were mainly civil, as the words *τοὺς διαφορομένους* would seem to indicate. These *δικασταὶ κατὰ δῆμους*, as they were called, were, like Peisistratus himself, primarily arbitrators, authorized to give a binding verdict if they failed to effect a friendly compromise. Their number is unknown. When they were restored in 453-452 B.C. they numbered thirty because of their connection with the trittyes. Peisistratus thus has the credit for anticipating one of the most admirable features of the Athenian legal system of the fourth century—public arbitration.<sup>2</sup>

De Sanctis refuses to accept Aristotle's statement that Peisistratus established the rural justices. The objection that they could not have been described as *κατὰ δῆμους* at this time is of little weight, for, although the demes were not treated as distinct political units until the reforms of Cleisthenes, they were ancient divisions, more ancient than the naucrariae. To his further objection that it is not easy to understand why Cleisthenes should have abolished them, it is sufficient to reply that it was only natural to dispense with an innovation of a hated régime, particularly when the new system encouraged the citizens to resort to the city rather than stay on their farms. His final objection is:

Finalmente perchè quanto la loro istituzione era opportuna nell'età di Pericle, altrettanto era di superfluo nell'età di Pisistrato quando ai tesmoteti non mancava il tempo di attendere alle cause rurali, non avendo ancora avuto il carico d'istruire tutti i processi di Stato carpitati all'Areopago.<sup>3</sup>

<sup>1</sup> *Ibid.* Cornélius (*Die Tyrannis in Athen*, p. 53) believes that the *Demenrichter* replaced some type of rural court which had been in the hands of the nobility.

<sup>2</sup> *Infra*, p. 348.

<sup>3</sup> *Storia della repubblica Ateniese*, p. 313. Cf. also De Sanctis' review of Calhoun's *Criminal Law*, in *Rivista di Filologia*, N.S., VI, 149 ff.

It is quite true that so far as the legal situation was concerned, the new judges may not have been needed until the period when the reorganization of the Areopagus threw additional burdens on the dicasteries. But the policy of Peisistratus was determined by political, not judicial, considerations.

The Areopagus continued to function as a homicide court under the tyrants. Peisistratus himself was summoned before it on a charge of murder. The prosecutor failed to appear, and the case was dropped.<sup>1</sup> The Areopagus was the chief criminal court in the Solonian constitution. It "corrected offenders, having full powers to inflict either fines or personal punishment." The Areopagus had authority also under the νόμος εἰσαγγελίας to try those charged with "plotting the overthrow of the state"<sup>2</sup> (τοὺς ἐπὶ καταλύσει τοῦ δήμου συρισταμένους). By a liberal, not to say cynical, construction of this law, the tyrant may have invoked it to protect himself against his political foes if the Areopagus was agreeable. Within a few years he might hope by the addition annually of nine ex-archons, favorable to himself, to possess in the Areopagus a willing instrument. Within a period of twenty years "the personnel of the court would be quite changed."<sup>3</sup> But long before a complete change in personnel came about, the tyrant would find the Areopagus manageable. The annual addition of nine adherents—ex-archons—would soon overcome the opposition of a numerical majority. But the history of the earlier struggles between the tyrant and his foes shows that the Areopagus neither did nor could aid him effectively. After five years he was ousted by a combination of the parties of the Plain and the Coast. Almost immediately he was enabled to return by effecting an arrangement with Megacles, the leader of the Coast party. But his second tenure of the tyranny was short-lived. Within the year he was driven out, and it was not until after the lapse of ten years that he was able to defeat his foes decisively and establish firmly his power by his victory at Pallene.<sup>4</sup>

<sup>1</sup> Aristotle *Ath. Pol.* xvi. 8.

<sup>2</sup> *Ibid.*, viii. 4.

<sup>3</sup> S. B. Smith, *op. cit.*, p. 114, n. 39.

<sup>4</sup> Bury, *History of Greece*, pp. 192 ff.

It was during this period, if at all, that the Areopagus became subservient to the interests of the tyrant.

For the ordinary administration of criminal law, magistrates, such as the thesmothetae and the Eleven, were available. Aristotle says that Peisistratus was *τοῖς ἀμαρτάνουσι συγγνωμονικός*.<sup>1</sup> This may mean that he interfered in the ordinary administration of justice to mitigate or reverse the verdicts of the magistrates either in the way of appeals or by the exercise of executive clemency. But it may also refer to a more direct and personal participation in proceedings against plotters who were seeking to overthrow the tyranny. Hippias himself took part in the interrogation of Aristogeiton, who slew Hipparchus. The object of the interrogation and torture was to secure the names of accomplices. Just how it was intended to dispose of Aristogeiton is not known, for Hippias slew him with his own hand in a moment of exasperation.<sup>2</sup> Aristogeiton and his accomplices, if any, could have been tried for murder by the Areopagus, but it seems more likely that the tyrants dealt with enemies who attempted violence, in summary fashion, perhaps through the agency of the Eleven.<sup>3</sup> It may be that the charge of murder against Peisistratus was due to his participation in the informal trial and execution of an enemy who had made an attempt on his life or engaged in a political conspiracy.<sup>4</sup>

<sup>1</sup> Aristotle *Ath. Pol.* xvi. 2.

<sup>2</sup> *Ibid.*, xviii. 6.

<sup>3</sup> Many citizens were slain or banished in the last years of the tyranny. See Aristotle *Ath. Pol.* xix. 1.

<sup>4</sup> Lysias, xii, tried to fasten upon Eratosthenes, one of the Thirty, responsibility for the murder of his brother Polemarchus, whom he had personally arrested.

## CHAPTER VII

### THE JUDICIAL REFORMS OF CLEISTHENES

The reforms of Cleisthenes belong to the period between the expulsion of the tyrants and the final defeat of Persia (510-480). The tyrants were not driven out of Athens by a popular uprising but by Spartan intervention. The exiled Alcmaeonids, failing in their attempts to expel the Peisistratidae forcibly, contrived to enlist the aid of the Spartans by bribing the oracle, as their enemies claimed.<sup>1</sup> The masses had not found the rule of Peisistratus irksome. It was, indeed, an era of peace and prosperity. "Hence," says Aristotle, "the tyranny of Peisistratus was often spoken of proverbially as the age of Cronus," i.e., the golden age.<sup>2</sup> But in after years, in a spirit of national pride, the Athenian populace ignored the services of Sparta, and made national heroes out of Harmodius and Aristogeiton, who had slain Hipparchus, one of the Peisistratidae, for purely personal reasons. The partisan feud of the Alcmaeonids with the Peisistratidae was treated as an episode in the national struggle for liberty. Witness the popularity of the Leipsydrium drinking-song, which was second only in popular favor to the famous Harmodius and Aristogeiton song. In this atmosphere the popular notions of the work of the Alcmaeonid, Cleisthenes, were likely to be divergent. According to a widespread view, he did little more than restore the constitution of Solon.<sup>3</sup> Others

<sup>1</sup> Aristotle *Ath. Pol.*, xix. Cf. De Sanctis, *op. cit.*, pp. 322 ff.

<sup>2</sup> *Ath. Pol.* xvi. 7: 'Ο ἐπὶ Κρόνου βίος. Although the rule of the sons of Peisistratus became much harsher, yet it did not lead to a popular uprising. Hippias' proposed fortification of Munychia as a place of refuge shows that he feared an uprising (*ibid.*, xix).

<sup>3</sup> Isocrates vii. 16: Εὐρίσκω γὰρ ταύτην μόνην ἂν γενομένην καὶ τῶν μελλόντων κινδύνων ἀποτροπὴν καὶ τῶν παρόντων κακῶν ἀπαλλαγὴν, ἣν ἐβελήσωμεν ἐκείνην τὴν δημοκρατίαν ἀναλαβεῖν, ἣν Σόλων μὲν ὁ δημοτικώτατος γενόμενος ἐνομοθέτησε, Κλεισθένης δ' ὁ τοὺς τυράννους ἐκβαλὼν καὶ τὸν δῆμον καταγαγὼν πάλιν ἐξ ἀρχῆς κατέστησεν.

Aristotle *Ath. Pol.* xxii. 1: καὶ γὰρ συνέβη τοὺς μὲν Σόλωνος νόμους ἀφανίσαι τὴν

regard him as the virtual founder of democracy.<sup>1</sup> There is an element of truth in both of these views.

Upon the overthrow of the tyranny, the nobles expected a restoration, not of the Solonian system, but of the pre-Solonian aristocracy. It was doubtless with this expectation that Cleomenes, the Spartan king, had intervened.<sup>2</sup> But the old political strife was renewed. Two main factions appeared. Isagoras was the leader of those nobles who had made terms with the tyrants. His opponent was Cleisthenes. At first it was a struggle for leadership. Isagoras proved the stronger, and with the support of the political clubs gained the archonship which was still the chief bone of contention between political factions. Cleisthenes, though the grandson of a tyrant of Sicyon, was an Alcmaeonid. Throughout the vicissitudes of their political fortunes this family had been more or less friendly to the masses. On this occasion Cleisthenes boldly appealed to the people. The time was well suited for such an appeal. On the expulsion of the tyrants there had been a revision of the list of citizens, aimed particularly at those adherents of the Peisistratidae who had gained citizenship through favor of the tyrants.<sup>3</sup> Many had been disfranchised. To these and others, Cleisthenes offered full participation in the counsels and activities of the state. This maneuver committed him to a program of democratic reform, both to satisfy the aspirations of the masses and to secure his own leadership.

With the backing of the people he easily gained the upper

τυραννίδα διὰ τὸ μὴ χρῆσθαι, καί[ν]ους δ' ἄλλους θείναι τὸν Κλεισθένη, στοχαζόμενον τοῦ πλῆθους . . . . .

Aristotle *Pol.* 1273b. 35 ff.: Σόλωνα δ' ἐνιοι μὲν οἴονται νομοθέτην γενέσθαι σπουδαίων· ὀλιγαρχίαν τε γὰρ καταλύσαι λίαν ἄκρατον οὖσαν καὶ δουλεύοντα τὸν δῆμον παῦσαι καὶ δημοκρατίαν καταστήσαι τὴν πάτριον.

<sup>1</sup> Aristotle *Ath. Pol.* xxix. 3: τοὺς πατέριους νόμους οὓς Κλεισθένης ἔθηκεν ὅτε καθίστη τὴν δημοκρατίαν.

<sup>2</sup> For the triumph and the reforms of Cleisthenes the chief sources are Herodotus v. 66, 69-70, 71-73; and Aristotle *Ath. Pol.*, xx-xxi. In the main, Aristotle follows Herodotus.

<sup>3</sup> Walker, *CAH*, IV, 145-46. Cf. Aristotle *Ath. Pol.* xiii. 5: σημεῖον δ', ὅτι μετὰ τῶν [τῶν] τυράννων κατάλυσιν ἐποίησαν διαψηφισμόν, ὥς πολλῶν κοινωνούντων τῆς πολιτείας οὐ προσήκον.

hand and put through some reforms, including the reorganization of the citizens into ten, instead of four, tribes, with a Senate of Five Hundred. Isagoras had recourse to Spartan aid. At his suggestion the Spartans revived the pollution charge against the Alcmaeonidae. For the moment Isagoras was successful. Cleisthenes and 700 heads of houses were banished. But the attempt of the Spartan king to set up an oligarchy of 300 was resisted by the senate and the people. The Spartans and their Athenian supporters took refuge in the Acropolis. Within three days they were forced to surrender. Aristotle's account differs from that of Herodotus, in the order of the events. According to Herodotus, Cleisthenes proceeded at once to introduce his reforms; but Aristotle seems to say that Cleisthenes put through no reforms until the Spartans were forced out of the city three years after the expulsion of the tyrants.<sup>1</sup> In some respects Herodotus' account is preferable. It explains the resistance and the identity of the senate. If the Senate of Five Hundred was already organized, its resistance to Cleomenes is easily understood. Moreover, it is difficult to account for opposition from the old Solonian Senate of Four Hundred.<sup>2</sup>

There is some doubt in regard to the status or official position of Cleisthenes. Some scholars believe that the assembly conferred upon him extraordinary legislative powers like those of Solon.<sup>3</sup> Certain expressions of Aristotle are quoted in support of this view, though Aristotle<sup>4</sup> expressly

<sup>1</sup> De Sanctis, *op. cit.*, p. 329, n. 2, following Beloch, *Griechische Geschichte* (2d ed.), I, 399, n. 1; Ehrenberg, "Kleisthenes und das Archontat," *Klio*, XIX, 106 ff. Walker, *op. cit.*, IV, 139-40, prefers the account of Aristotle and identifies the senate (*Ath. Pol.* xx. 3) as the Solonian Senate of Four Hundred. Cloché ("La boulé d'Athènes en 508-507 avant J.-C.," *Rev. d. études grecques*, XXXVII [1924], 1 ff.) firmly supports the theory that it was the Solonian Senate of Four Hundred.

<sup>2</sup> Walker (*op. cit.*, p. 140, n. 1) suggests the hypothesis that the council was the Areopagus. But Isagoras would never have consented to the dissolution of the Areopagus (*Ath. Pol.* xx. 3). For the importance of the boulé in Cleisthenes' scheme cf. *infra*, p. 342.

<sup>3</sup> Busolt-Swoboda, *Staatskunde*, p. 869, n. 5.

<sup>4</sup> *Ath. Pol.* xx. 4; xxi. 1: και(ν)οὺς δ' ἄλλους θείναι τὸν Κλεισθένη στοχαζόμενον τοῦ πλῆθους; xxi. 3: τοὺς πατέριους νόμους οὐς Κλεισθένης ἔθηκεν.

says that he was *ἡγεμὼν καὶ τοῦ δήμου προστάτης*. He was never even an archon.<sup>1</sup> In one important respect the reforms associated with the name of Cleisthenes differ from those of other extraordinary legislators. The work was not accomplished at one stroke, so to speak, but extended over a period of years. Thus ostracism, the oath of the *boulé*, and the Board of the Ten Generals were introduced several years after the reorganization of the tribes. In view of this feature of Cleisthenes' work, Beloch<sup>2</sup> suggests that he was the leading member of a legislative commission. According to his view, it is too late for plenipotentary lawgivers; they belong to a more primitive stage of political development. Later revolutions were regularly followed by legislative commissions. But a much better parallel to Cleisthenes' reforms is, not the formal legislative commissions of the revolutions in 411 and 404 B.C., but the reformers, led or inspired by Ephialtes, who in his struggle against the Areopagus initiated a period of democratic development. Cleisthenes, like Ephialtes, seems to have disappeared from public life very soon after the movement was initiated,<sup>3</sup> and others carried on his work by legislation calculated to give effect to the aspirations of a people that had been singularly successful, not only in getting rid of the tyrants, but in escaping from the tutelage of Sparta and in defeating the Persians single handed. It was a period of rapid evolution.<sup>4</sup> No legislative commission, no individual legislator appointed immediately after the expulsion of the tyrants, could have served the purpose.

Cleisthenes was not a political reformer by conviction, like Solon, but merely a shrewd politician who aimed at securing the good will of the populace (*στοχαζόμενον τοῦ πλήθους*). Like

<sup>1</sup> De Sanctis, *op. cit.*, p. 229, n. 2. Compare Ehrenberg, (*op. cit.*, p. 107), who thinks it possible that Cleisthenes was archon in 509-508 B.C. Wilamowitz (*Aristoteles und Athen*, I, 6) suggests 508-507 as the archonship of Cleisthenes.

<sup>2</sup> Beloch, *op. cit.*, p. 396 n. Compare Ehrenberg (*op. cit.*, p. 107), who rejects Beloch's view.

<sup>3</sup> Cf. *infra*, pp. 252 f. No names of associates or followers of Cleisthenes are preserved in the records, unless Cannonus be one. (Cf. *infra*, p. 205.)

<sup>4</sup> Aristotle (*Pol.*, p. 1274a) characterizes the growth of democracy during this period as due to "accident" (*ἀπὸ συμπτώματος*) not "design" (*οὐ κατὰ . . . προαίρεσιν*).

all successful popular leaders, his first concern was to secure his own position. He saw that the only way to accomplish this was to prevent the return of the tyrants and to weaken the nobles by putting power into the hands of the people. A man of Cleisthenes' social and political antecedents was not the kind of statesman to appear with a comprehensive program of democratic reform. And even if he had the vision of a Solon, he was too shrewd a politician to imagine that a people wholly without political experience could operate a complete democratic system. The democratic movement extended over more than twenty-five years. A setback came with the revived prestige of the Areopagus, whose political supremacy in the state, beginning with the Battle of Salamis, is said to have lasted for seventeen years.<sup>1</sup> During the twenty-five years of democratic progress, a number of measures must have been adopted of which no mention is made in the sources. They may be included in the new laws mentioned by Aristotle.<sup>2</sup> It is true that Aristotle attributes them to Cleisthenes. But it is not known either how long Cleisthenes retained his leadership or when he died. The fact that he is not mentioned in connection with the war with Boeotia and Euboea would seem to indicate that his leadership was short-lived. Walker<sup>3</sup> has suggested that the Persian policy of Cleisthenes was the cause of his downfall. Faced by the hostility of Sparta, Boeotia, and Chalcis, and a war on three fronts, he sent an embassy to Persia, seeking aid. Persia demanded earth and water as symbols of subjection before entering into alliance with Athens. The ambassadors, "on their own responsibility," according to Herodotus, acceded to the demand. The Persian alliance was rejected, and the ambassadors were severely criticized.<sup>4</sup> Cleisthenes, it is argued, was involved in their disgrace. If this be correct,

<sup>1</sup> Aristotle *Ath. Pol.*, xxiii (479-462).

<sup>2</sup> *Ibid.*, xxii. 1.

<sup>3</sup> *Op. cit.*, pp. 167-68.

<sup>4</sup> Herodotus v. 73: εἰ μὲν διδοῦσι βασιλεῖ Δαρεΐφ Ἀθηναῖοι γῆν τε καὶ ὕδωρ, ὃ δὲ συμμαχίην σφι συνετίθετο, εἰ δὲ μὴ διδοῦσι, ἀπαλλάσσεσθαι αὐτοὺς ἐκέλευε. οἱ δὲ ἄγγελοι ἐπὶ σφῶν αὐτῶν βαλλόμενοι διδόναι ἔφασαν, βουλόμενοι τὴν συμμαχίην ποιήσασθαι. οὗτοι μὲν δὴ ἀπελθόντες εἰς τὴν ἑωυτῶν αἰτίας μεγάλας εἶχον.



a number of the "new laws" must have emanated from other leaders of the school of Cleisthenes, men who saw the wisdom of throwing in their lot with democracy and sharing in its success.

The reorganization of the tribes and the substitution of the demes for naucraries were political measures intended to break up the power of the nobles and to facilitate the absorption of the new citizens.<sup>1</sup> The unit of the new tribes was the deme, not the clan. In the deme system local association was substituted for community of relationship. The system of tribes, trittyes, and demes was intricate and artificial. In its purpose of weakening the power of the nobles who were opposed to the democratization of the state, it has some analogy with the well-known American device called "gerrymander."<sup>2</sup> The demes of Attica were divided roughly into three groups: first, those of the city and its environs; second, those of the coast; and third, those in the interior. The demes in each of these areas were distributed into ten groups called "trittyes"; and three trittyes, one from each area, constituted a tribe. The tribe was no longer a geographical unit but contained elements from the inhabitants of the city, the coast, and the interior.

A new council (*βουλή*) was instituted, consisting of 500 members. Fifty were drawn from each tribe. The demes included in each of the tribes varied in size and number, but there was devised some means of apportioning the senators of each tribe among the demes included in it. The members of the council were selected by lot from a larger group nominated by the demes. They had to be at least thirty years of age. It is impossible to say how many of the duties that the council performed in the later period go back to Cleisthenes. At any rate, he introduced the oath which the council continued to swear in Aristotle's day. In essence the

<sup>1</sup> Walker, *op. cit.*, pp. 142 ff.; Aristotle, *op. cit.*, xxii.

<sup>2</sup> In 1812 Governor Gerry of Massachusetts was believed to be responsible for a redistribution of the congressional districts of the state which gave his party an unfair advantage in elections. The dragon-like shape of one of the districts suggested to a political opponent the word "gerrymander" (cf. "salamander") to describe the unfair distribution of municipal units in electoral districts.

boulé was a commission of the ecclesia intrusted with the task of preparing the agenda for the sessions of the ecclesia. It constituted an excellent training school for the masses who had had no opportunity under the tyranny for gaining political experience. As the office of councilor could not be held more than twice, it has been estimated that a third of the citizen body must at some time in their lives have served on the council.<sup>1</sup> Apparently the functions of the naucraroi were apportioned between the demarchs of the newly organized demes and the boulé. The prytaneis of the council were modeled on those of the naucraroi.

After describing the major constitutional changes introduced immediately by Cleisthenes, Aristotle says that Cleisthenes introduced "new laws" in place of those of Solon which had fallen into desuetude during the period of the tyranny.<sup>2</sup> These new laws were constitutional.<sup>3</sup> This appears from the mention of ostracism as one of them. They are the only laws that would be disregarded during the rule of the Peisistratidae. The ordinary civil and criminal laws would continue to be administered as before, but by different agencies. Other examples of these new measures attributed to Cleisthenes are the new oath for the boulé and the election of ten generals by the tribes.<sup>4</sup>

Ostracism was a novel and ingenious device to protect the people from tyranny.<sup>5</sup> In one form or another it appears in different Greek cities, but there is good reason for believing that all the varieties were derived from Athens.<sup>6</sup> Once a

<sup>1</sup> Aristotle has little to say about the organization of the boulé. Cf. *Ath. Pol.* xxi. 3; xxii. 2: . . . ἐφ' Ἐρμοκρέοντος ἀρχοντος, τῇ βουλῇ τοῖς πεντακοσίοις τὸν δρῶν ἐποίησαν, ὃν ἔτι καὶ νῦν ὁμνῶσιν.

Cf. Walker, *op. cit.*, pp. 149 ff.; Busolt-Swoboda, *op. cit.*, pp. 882 ff.

<sup>2</sup> Aristotle *Ath. Pol.* xxii. 1. Cf. Calhoun, *Criminal Law*, pp. 88 ff.

<sup>3</sup> Carcopino, *Histoire de l'ostracisme athénien*, p. 98.

<sup>4</sup> Aristotle *Ath. Pol.* xxii. 2.

<sup>5</sup> Ostracism soon came to be used as a convenient weapon in party struggles (De Sanctis, *op. cit.*, p. 372). In the fourth century the γραφή παρανόμων displaced ostracism as a means of attack in political warfare (Bury, *History of Greece*, p. 462). Cf. Sanguinetti (*Notas para un ensayo sobre el ostracismo* [Buenos Aires, 1922]), who thinks that ostracism was not a party weapon.

<sup>6</sup> Walker, *op. cit.*, p. 151.

year a vote was taken on the question of holding an ostracism that year. If the vote was in favor of ostracism, at a subsequent meeting in the agora the people voted secretly by tribes. The man who received the majority of votes was exiled for ten years.<sup>1</sup> It has been a much vexed question whether the 6,000 votes required in ostracism constituted a majority or a quorum. Apparently the Greeks of succeeding ages were in doubt. Plutarch<sup>2</sup> says very definitely that the number 6,000 was a quorum. Philochorus is cited in favor of the majority theory. *διαριθμηθέντων δὲ (τῶν ὀστράκων) ὅτῳ πλεῖστα γένοιτο καὶ μὴ ἐλάττω ἑξακισχιλίων τοῦτον ἔδει . . . ἐν δέκα ἡμέραις μεταστῆναι τῆς πόλεως ἑτὴ δέκα. ὕστερον δὲ ἐγένοντο πέντε.*<sup>3</sup> This testimony is not beyond suspicion. The statement that the period of banishment was subsequently reduced to five years is incorrect. The passage, as quoted by Photius, was no doubt shortened and compressed. In the process the meaning may easily have been changed. Modern opinion has been divided. Arguments on both sides were so evenly matched that a deadlock resulted. Not until it was pointed out that the same principle must underlie the requirement of a minimum vote of 6,000 in ostracism and in the so-called *νόμοι ἐπ' ἀνδρί*, and the selection of 6,000 jurors annually for service in the heliastic courts, was it finally recognized that 6,000 must be a quorum.<sup>4</sup> In both cases the 6,000 were regarded as representatives of the Athenian people.

Ostracism was an administrative rather than a judicial act. A man could be ostracized without accusation or defense. When the question of the advisability of holding an ostracism came up in the assembly there was no debate and

<sup>1</sup> Philochorus (*Fragmenta Historicorum Graecorum*, I. 396) is the source of our knowledge of the procedure in ostracism. The passage is cited by Sandys in his notes on Aristotle *Ath. Pol.* xxii. 1.

<sup>2</sup> *Aristeides* vii. 8: *εἰ γὰρ ἑξακισχιλίων ἐλάττωτες οἱ γράψαντες εἶεν, ἀτελής ἦν ὁ ἐξοστρακισμός. ἔπειτα τῶν βρομάτων ἕκαστον ἰδίᾳ θέντες τὸν ὑπὸ τῶν πλείστων γεγραμμένων ἐξεκήρυττον εἰς ἑτὴ δέκα καρπούμενον τὰ αὐτοῦ.*

<sup>3</sup> *FHG* I. 396.

<sup>4</sup> For a full statement of the arguments in favor of the quorum theory, cf. Bonner, "The Minimum Vote in Ostracism," *Class. Phil.*, VIII, 223-25. Their validity is recognized by Busolt-Swoboda, *op. cit.*, p. 885, n. 2.

no mention of names.<sup>1</sup> Aristotle<sup>2</sup> says the vote had to be taken in the *κυρία ἐκκλησία* of the sixth prytany. The senate was required by law to put the question on the program. They had no option. Considerations which are set forth below<sup>3</sup> seem to indicate very strongly that the distinction between the *κυρία* and the other assemblies was that a quorum of 6,000 was required in the *κυρία ἐκκλησία*. Manifestly, although ostracism was not a judicial act, it was desirable that great care should be taken to ascertain the prevailing public sentiment both as to the desirability of holding an ostracism and as to which citizen ought to be exiled.

It is to be expected that a measure intended to protect the city against a prospective tyrant would have been introduced immediately after the expulsion of the tyrants. And yet, according to the available records, no one was ostracized until 487 B.C., many years later. In the meantime the Battle of Marathon had been won, democracy was firmly established, and all hopes or fears of a forcible restoration of the Peisistratidae must have been dissipated. A rather plausible explanation of Aristotle's statement that the first case of ostracism occurred in 488-487 is that he drew his information from the amnesty decree passed in 480 on the eve of Xerxes' invasion, recalling all ostracized citizens. As the period of exile was ten years, no one exiled before 490 would appear on the decree.<sup>4</sup>

Sometime between the expulsion of the tyrants and the age of Pericles the Heliaea ceased to be a court of appeal and became a court of first resort. When once this momentous step was taken, it is obvious that a single court could not

<sup>1</sup> Carcopino, *op. cit.*, p. 129. The fourth oration of Andocides purporting to have been delivered against Alcibiades on the occasion of a vote on ostracism is now regarded as a rhetorical exercise. Cf. Jebb, *The Attic Orators*, I, 132 ff.

<sup>2</sup> *Ath. Pol.* xliii. 5.

<sup>3</sup> Pp. 217 ff.

<sup>4</sup> Mathieu, *Aristote, Constitution d'Athènes*, p. 56. Walker (*op. cit.*, p. 152) accepts Mathieu's explanation. An obvious objection to the view of Mathieu is that Aristotle himself would have been well aware that the amnesty decree of 480 B.C. was inadequate evidence. Cf. Carcopino, *op. cit.*, pp. 103-7; also Busolt-Swoboda, *op. cit.*, p. 886, who express much the same opinion as Carcopino. The delay in applying the law was "weil nach seiner Annahme die Parteilage eine so schwankende wurde, dass keine Partei des Ausganges der Ostrakophoria sicher war."

handle all the litigation of the community. A new system of courts called "dicasteries," drawn from the membership of the Heliaea, was introduced. The magistrates ceased to act as judges; they merely prepared the cases for trial and acted as chairmen of the court sessions. No ancient writer mentions this important reorganization of the Heliaea which gave democracy full control of the administration of justice, but it is usually regarded as the work of Cleisthenes.<sup>1</sup> It may have been effected by one of the "new laws" mentioned by Aristotle. The commonly accepted view is that the increase in the number of appeals led to the change. This is to be preferred to the theory that Cleisthenes came forward with a complete program of reform, including the institution of the dicasteries. Nothing that is known of Cleisthenes justifies the belief that he was a man with a mission. He was rather the type of politician that not only senses the political aspirations of the masses but has the wisdom to estimate their fitness for further exercise of power. This was as it should be. A people who had just emerged from a half-century of tyranny was quite unfitted to take over the government of a state. They needed training and experience. It was the merit of Cleisthenes and his immediate subordinates or successors that they recognized this situation and put democracy on a sound basis, introducing innovations gradually, as the need for them arose and the people displayed their fitness for further responsibilities. In the absence of records of litigation during this period, we have no evidence to go on. But in such a fundamental change as was involved in substituting regular constitutional government for tyranny, the necessary adjustments may have involved considerable litigation. An increase in the number of appeals would naturally follow. If there was any general attempt to recover by legal process the lands confiscated<sup>2</sup> by the Peisistratidae, there would be plenty of lawsuits and appeals. Eventually

<sup>1</sup> Lipsius, *op. cit.*, p. 32. Cf. Busolt-Swoboda, *op. cit.*, p. 883.

<sup>2</sup> For exile and confiscation of property of the nobility, cf. Busolt, *Geschichte*, II, 327-29; cf. Cornelius, *Die Tyrannis in Athen*, p. 52.

the constant appeals would reduce the magisterial decision to a mere form.<sup>1</sup>

But the change in the judicial functions of the magistrates may have been brought about in quite a different fashion. There is evidence that soon after the expulsion of the tyrants the assembly (Heliæa) began to act as a court of first instance and to try cases that lay beyond the normal jurisdiction of the magistrates. Under the Solonian system such cases would have come before the Areopagus. This invasion of the assembly into the judicial field was no infringement on the functions of the magistrates. It is quite compatible with the continuance of a system of appeals in the routine cases. It was rather a natural shift of important judicial power to the sovereign body in the state. The inevitable effect of the exercise of these judicial functions by the assembly would be to give weight (if it did not give rise) to the demand that the people try all cases in the first instance.

The first case known with certainty to have been tried by the assembly<sup>2</sup> is that of Miltiades, who was charged in 489 B.C. with deceiving the people.<sup>3</sup> Asking for seventy ships, he promised the Athenians that he would enrich them if they would grant his request. He refused to disclose the objective of the proposed expedition, which was Paros. When he returned unsuccessful, there was a great deal of criticism of his conduct (*εἶχον ἐν στόμασι, οἳ τε ἄλλοι καὶ μάλιστα, κ.τ.λ.*). Xanthippus arraigned him in the assembly for deceiving the people (*τῆς Ἀθηναίων ἀπάτης εἵνεκεν*). Narrowly escaping the death penalty asked by the prosecutor, he was fined 50 talents.

There are records of two other cases which may very well have been tried in the assembly. Already in 493 B.C., Miltiades had been tried in Athens for tyranny in the Cher-

<sup>1</sup> Even if the system of appeals had failed in the period between Solon and Peisistratus, the memory of the failure would probably have disappeared in the half-century of tyranny. It would be most natural for Cleisthenes to re-establish the Solonian system of appeals at first.

<sup>2</sup> Lipsius, *op. cit.*, p. 180.

<sup>3</sup> Herodotus vi. 136.

sonese.<sup>1</sup> One may wonder how an Athenian could be tried in Athens for exercising autocratic authority over barbarians. The most plausible explanation is that he extended his authority over an Athenian community settled in the Chersonese.<sup>2</sup> Aristotle<sup>3</sup> cites a mild Athenian law against tyrants which was in force in Athens in the sixth century. In the earlier period the only body capable of enforcing such a law was the Areopagus; but under the Cleisthenean constitution, while the Areopagus was still legally competent, the logical body to try tyrants was the body that protected the community against potential tyrants by means of ostracism, that is, the assembly. Herodotus says that the case came before a *δικαστήριον*, but it would be hazardous to conclude that Herodotus is using *δικαστήριον* advisedly in its technical sense.<sup>4</sup> In view of the unique nature of the charge, it is quite improbable that it could have been handled by any of the normal processes of law even if the heliastic courts were in existence at that time. Impeachment (*εἰσαγγελία*) was intended, among other things, to take care of cases for which there was no provision in the ordinary criminal code. Moreover, as Miltiades was tried by the assembly in 489 for deceiving the people, it is wholly unlikely that he was tried by a dicastery in 493 for tyranny.

An even more unusual case was tried in Athens in the same year in which Miltiades was tried for tyranny. The

<sup>1</sup> *Ibid.*, 104: ἀμα δὲ ἐκφυγόντα τε τούτους καὶ ἀπικόμενον εἰς τὴν ἐωντοῦ δοκούντᾳ τε εἶναι ἐν σωτηρίᾳ ἤδη, τὸ ἐθευτέν μιν οἱ ἐχθροὶ ὑποδεξάμενοι καὶ ὑπὸ δικαστήριον [αὐτὸν] ἀγαγόντες ἐδίωξαν τυραννίδος τῆς ἐν Χερσονήσῳ. ἀποφυγῶν δὲ καὶ τούτους στρατηγὸς οὕτως Ἀθηναίων ἀπεδέχθη, αἰρεθείς ὑπὸ τοῦ δήμου.

<sup>2</sup> Walker (*op. cit.*, IV, 171) regards both trials of Miltiades as incidents in the party struggles between the Alcmaeonidae and the Philaidae clan of which Miltiades was the head. For the relations between the enterprise of the elder Miltiades in the Chersonese and the external policy of Peisistratus, compare Cornelius, *op. cit.*, pp. 33 ff. Munro (*CAH*, IV, 232) thinks that Miltiades was not tried in 493 but was disqualified for office on the ground that, having been a tyrant, he might be a danger to Athens.

<sup>3</sup> *Ath. Pol.* xvi. 10: ἦσαν δὲ καὶ τοῖς Ἀθηναίοις οἱ περὶ τῶν τυράννων νόμοι πρῶτοι κατ' ἐκείνους τοὺς καιροὺς.

<sup>4</sup> Busolt-Swoboda, *op. cit.*, p. 884, n. 1: "Ob Herodotus genau berichtet, ist fraglich, die Verweisung der Klage an das Volksgericht möglich."

fall of Miletus in 494 had made a deep impression on the Athenians, which found expression in their resentment at Phrynichus for making the misfortunes of Miletus the subject of a tragedy. The whole audience burst into tears; and the Athenians fined Phrynichus 1,000 drachmas for reminding them of misfortunes that touched them so closely, and banned the drama from the stage.<sup>1</sup> It has been suggested that the charge was impiety because the tears of the audience profaned the festival of the god.<sup>2</sup> But whatever the charge was, the motive back of the prosecution was undoubtedly political.<sup>3</sup> The natural court for such a trial was the assembly. And the ban upon further production of the drama could come only from a body that possessed administrative as well as judicial functions.

Hipparchus, son of Charmus, was summoned by the ecclesia for treason (*προδοσία*).<sup>4</sup> Failing to answer the summons, he was condemned to death in his absence. He was ostracized in 488,<sup>5</sup> and there is no reason why he may not, like Themistocles,<sup>6</sup> have been tried during his period of ostracism. On the other hand, if he was still in good standing in 480, and returned with other exiles included in the amnesty proclamation, he may have been tried some time after 480.

There is still another possible instance of early judicial action on the part of the assembly. When Cleomenes, the Spartan king, was permitted to withdraw from the Acropolis (508–507 B.C.) under a safe conduct, his Athenian allies, according to Herodotus'<sup>7</sup> version of the incident, were thrown

<sup>1</sup> Herodotus vi. 21: 'Ἀθηναῖοι μὲν γὰρ δῆλον ἐποίησαν ὑπεραχθεσθέντες τῇ Μιλήτου ἀλώσει τῇ τε ἄλλῃ πολλαχῇ καὶ δὴ καὶ ποιήσαντι Φρυνίχῳ δρᾶμα Μιλήτου ἄλωσιν καὶ διδάξαντι ἐς δάκρυά τε ἔπεσε τό θέητρον καὶ ἐξημίωσάν μιν ὡς ἀναμνήσαντα οἰκῆια κακὰ χιλιῇσι δραχμῇσι, καὶ ἐπέταξαν μηκέτι μηδὲνα χρᾶσθαι τούτῳ τῷ δράματι.

<sup>2</sup> Meyer, *Geschichte des Altertums*, III, 313.

<sup>3</sup> Walker, *op. cit.*, IV, 172. How and Wells, *A Commentary on Herodotus*, VI, 21, n. 2. Meyer (*op. cit.*) regards the play as inspired by Themistocles to win the people to his naval policy.

<sup>4</sup> Lycurgus *In Leocratem*, 117.

<sup>5</sup> Aristotle *Ath. Pol.* xxii. 4.

<sup>6</sup> Bury, *op. cit.*, pp. 334–35.

<sup>7</sup> Herodotus v. 72: τοὺς δὲ ἄλλους Ἀθηναῖοι κατέδησαν τὴν ἐπὶ θανάτῳ.



into prison for execution. The execution was authorized by a decree of the assembly, if the scholiast on Aristophanes' *Lysistrata*<sup>1</sup> is correct. As they were caught red-handed making common cause with enemies within the gates, it was a case for summary action by an outraged community. The popular assembly was the natural representative of the community.

These cases point to the conclusion that the assembly had acquired the right to take independent judicial action when the existing legal processes did not afford the community adequate means of redress.<sup>2</sup> The earliest certain instance of judicial action by the assembly occurred in 493 B.C., but the change in the constitution empowering the assembly to take independent judicial action must have been much earlier.

The administration of justice was one of the most important functions of government.<sup>3</sup> Cleisthenes could not have failed to realize that without independent judicial powers the ecclesia could not become the sovereign body in the state. A preponderance of power would have been in the hands of the Areopagus or of the newly created Council of Five Hundred.<sup>4</sup> The close relationship between the boulé and the ecclesia makes it seem likely that the independent judicial powers of the ecclesia date from the restriction of the punitive powers of the boulé in 502-501 B.C., when "they first imposed upon the Council of Five Hundred the oath which they take to the present day."<sup>5</sup>

Three old laws are known which deal with the judicial powers of the assembly. One is a fragmentary decree regard-

<sup>1</sup> Line 273: τὰς οἰκίας κατέσκαψαν καὶ τὰς οὐσίας ἐδήμευσαν, αὐτῶν δὲ θάνατον ἐλήφισαντο. Aristotle (*Ath. Pol.* xx. 3) says that all the opponents of Cleisthenes were set free: Κλεομένην μὲν καὶ τοὺς μετ' αὐτοῦ πάντας ἀφείλαν ὑποσπόνδους. Cf. Mathieu, *op. cit.*, pp. 55-56. Busolt-Swoboda, *op. cit.*, p. 1007, believe that Isagoras and his followers were put to death by a decree of the people.

<sup>2</sup> Cf. Lipsius, *op. cit.*, p. 33.

<sup>3</sup> Aristotle *Ath. Pol.*, ix.

<sup>4</sup> There is no reason to suppose that Cleisthenes restricted by law the judicial powers of the Areopagus. Cf. *infra*, p. 251.

<sup>5</sup> Aristotle *Ath. Pol.* xxii, 2. For the restriction of the punitive powers of the boulé, cf. *infra*, pp. 335 ff.

ing the *boulé* and the *ecclesia*.<sup>1</sup> The extant version belongs to the late fifth century, but it is quite obviously a re-enactment of a much earlier law.

## PART I

- Line 21: [πεντ]ακοσιο  
 Line 23: καὶ τῷ δῇ[μῳ]  
 Line 24: δ]εμίαν  
 Line 25: κεκλημ[έν]ο  
 Line 26: [ἄνευ τοῦ δήμου τοῦ Ἀθηναίων] πληθύνοντος [μῆ]  
 Line 28: [ἐπιψ]ηφίῳ ἐμ [β]ουλῇ  
 Line 29: ἐπιψηφίζω  
 Line 31: βουλευεῖν τοῦ[s] πεντα[κ]ο[σί]ου[s]  
 Line 32: [πεντ]ακοσίας δραχ[μάς]  
 Line 33: . . . . αν δ' ὁ δ[ῆ]μο[s] πληθ[ύ]ω[ν]  
 Line 34: ἐν τῷ βουλευτηρίῳ  
 Line 36: [ἄνευ τοῦ δήμου τοῦ Ἀθηναίων πληθύνοντ]ος μὴ εἶναι πόλεμο[ν]  
 Line 37: [ἄνευ τοῦ δήμου τοῦ Ἀθηναίων πλη]θύνοντος μὴ εἶναι θάνα[α]το[ν]  
 Line 38: [ἄνευ τοῦ δήμ]ου τοῦ Ἀθηναίων πληθ[ύ]οντος μὴ

## PART II

- Line 2: [ἐντ]ὸς τριάκοντα ἡμερῶν, ἐπειδ[άν] . .  
 Line 3: [Ἀθηνα]ίων μηδὲ ἐνὶ μῆ[τε] βουλῇ μήτε  
 Line 4: [ἄνευ τοῦ δήμου τοῦ Ἀθηναίων πληθύ]οντος μὴ εἶναι θάνα  
     ἐπιβαλεῖν [Ἀθη]ναίων μηδὲ [ἐνὶ]  
 Line 5: . . . . ε βούλησιν ἄνευ  
 Line 6: ὅπως ἂν δοκῇ  
 Line 8: [τ]οὺς πεντακοσίους πρὶν παύεσθαι τῆς ἀρχῆς  
 Line 9: [τῷ δήμῳ τῷ]ι Ἀθηναίων πληθύνοντι, ὅτι ἂν βούληται  
 Line 10: . . . . τῶν δημοσίων ἐπιβαναγκες εἶναι τῇ βου[λῇ]  
 Line 11: δεύτεραν πρεσβείαν, τρίτον δημο . . . .  
 Line 12: πρὸς τοὺς πρυτάνεις καὶ βουλε . . . .  
 Line 13: . . . . αι τοῦ πολέμου πέρι καὶ τῶν τρ . . . .  
 Line 14: . . . . να τῷ δήμῳ ἐντὸς ἑξ ἡ[μερῶν]  
 Line 15: [γνώμην συ]μβάλλεσθαι τὴν βουλήν  
 Line 16: ἐκκλησίᾳ καὶ ε . . . .  
 Line 17: ἐκκλη[σι]ᾳ τῆς . . . .

This decree, according to the editors of the *Corpus*, deals with the relative powers of the *boulé* and the *ecclesia*. Wilamowitz<sup>2</sup> sees in it "eine Instruktion des Rates für Vorsitz in der Volksversammlung." Justification for this view may be found in Part II, lines 10-13, which seem to set down

<sup>1</sup> *CIA* i. 57.

<sup>2</sup> *Op. cit.*, II, 195, n. 9.

the order in which certain matters are to be dealt with in the senate and brought before the ecclesia. They include embassies and war. In the first part of the document the word ἐπιψηφίω (I. 28) seems to belong to an oath to be taken by the senators. The occurrence of the words πεντακοσίας δραχμάς (I. 32) suggests the well-known limitation of the punitive powers of the boulé to the infliction of a fine of 500 drachmas.<sup>1</sup> But by far the most interesting feature of the document, and one that has not attracted the attention it deserves, is the reference to δῆμος πληθύων.<sup>2</sup> Certain matters can be dealt with only by the δῆμος πληθύων. Among them are war, the infliction of the death penalty, and the imposition of a fine, probably above a specified amount, 500 drachmas (I. 37; II. 4).<sup>3</sup> There were other restricted matters, as the occurrence of the phrase ἄνευ τοῦ δήμου τοῦ Ἀθηναίων πληθύνοντος no fewer than seven times in these scanty fragments, clearly indicates. The question will come up again in connection with the discussion of the κυρία ἐκκλησία. For the present it is sufficient to point out that only a "full assembly" could determine questions relating to peace and war (I. 36) and exercise judicial functions. These are the most important powers of the sovereign body in a state. It would seem that the senate and the prytaneis were bound by sanctions and oaths to bring these and other important matters only before a δῆμος πληθύων. The document shows no trace of a definition of the phrase. The mention of ἐκκλησία in the last two lines of Part II shows that there are two kinds of assemblies. Obviously the difference between an ἐκκλησία and a δῆμος πληθύων was that a quorum was required for the latter. In view of the requirement of 6,000 votes in ostracism, it is not to be supposed that a citizen would be put to death, banished, or disfranchised by a less representative vote.

The editors of the *Corpus* date the present edition of the

<sup>1</sup> For the date of this decree and its effect on the powers of the boulé, cf. *infra*, p. 339.

<sup>2</sup> Cf. Glotz, in Daremberg-Saglio, s.v. "Ekklesia," p. 525.

<sup>3</sup> Between the limits of death and a fine fall banishment and disfranchisement as penalties.

law just after the overthrow of the Four Hundred. In this period there was a revision of the laws.<sup>1</sup> The Four Hundred had advocated, if not effected, a reduction of the citizens to 5,000, by giving the franchise to those only who could furnish themselves with arms. It is possible that there was a modicum of truth in the claim of the emissaries of the revolutionists to the army at Samos that the attendance at the ecclesia never exceeded 5,000.<sup>2</sup> There may have been some laxity in enforcing the quorum requirement in the stress of war. A re-enactment and stricter enforcement of the law specifying the matters that must come before a "full" assembly would deprive future revolutionists of a plausible argument in favor of restricting the franchise. Not much interest in fixing the date of the original enactment has been evinced. Scholars have been generally content to accept the editor's view that it is an ancient law.<sup>3</sup> Swoboda<sup>4</sup> suggests the reforms of Ephialtes as a likely date. This suggestion has been rejected by Cloché on the general ground that the reforms of Ephialtes increased, rather than restricted, the powers of the *boulé* and the ecclesia. He argues that it belongs to the period between the accession of Cleisthenes to power and the second Persian war.<sup>5</sup> In 479 the ecclesia already had the power of making peace. When Mardonius, on the eve of the Battle of Plataea, made proposals to the Athenians in the hope of detaching them from the national cause, his messenger appeared before the *boulé*. Alcidas proposed that they accept the proposition and lay it before the people. Highly incensed at this motion, the senators and some others fell upon Alcidas and stoned him to death.<sup>6</sup> The procedure here is in accordance with the regular practice. The senate made a *probouleuma* on the

<sup>1</sup> Busolt, *op. cit.*, III, 2, 1538.

<sup>2</sup> Thucydides viii. 72.

<sup>3</sup> *θωά* (II. 4), meaning "punishment," is one of the *priscæ dictionis vestigia* relied upon by the editors in assigning an early date to the original law.

<sup>4</sup> *Hermes*, XXVIII, 597.

<sup>5</sup> Cloché, "Le conseil athénien des cinq cents et la peine de mort," *Rev. d. études grecques*, XXXIII, 32.

<sup>6</sup> Herodotus ix. 5: ὁ μὲν δὴ ταύτην τὴν γνώμην ἀπεφαίνετο, εἶτε δὴ δεδεγμένος χρήματα παρὰ Μαρδονίου, εἶτε καὶ ταῦτά οἱ ἐάνθανε· Ἀθηναῖοι δὲ αὐτίκα δεινὸν ποιησάμενοι, οἱ τε ἐκ τῆς βουλῆς καὶ οἱ ἔξωθεν, ὡς ἐπύθοντο, περιστάντες Λυκίῳ κατέλευσαν βάλλοντες, τὸν δὲ Ἑλλησπόντιον [Μουρυχίδην] ἀπέπεμψαν ἄσινεα.

basis of information it had received. There is, then, no reason why the law may not be prior to 479, so far as it concerns the peace-making powers of the assembly (I. 36).

Another clue to the date of the document is to be found in Aristotle's<sup>1</sup> statement that in 502-501 B.C. the Senate of Five Hundred swore for the first time the oath still in use in his day. The oath of the *boulé* was either instituted or fundamentally revised at that time. Its importance is indicated by the fact that Aristotle singles it out for mention. Now the word *ἐπιψηφίω* (I. 28) in the decree seems to belong to the formula of an oath, sworn presumably by the *boulé*. In the act of settlement fixing the relations between Athens and Chalcis in Euboea in 446 B.C., after the revolt was crushed, the words *οὐδ' ἐπιφσηφίω* occur in the oath taken by the senate ratifying the settlement.<sup>2</sup> It may be conjectured that the senate in the present law was required to bind itself by oath, among other things, to put motions regarding certain specified matters only in a "full" assembly. In this way the responsibility for securing a quorum would rest with the *prytaneis*. The fact that this item of the senatorial oath is nowhere else mentioned need occasion no concern, for the complete oath has not been preserved. The oath and the document seem so closely related that there is good reason for believing that they are of the same date, 502-501 B.C.<sup>3</sup>

At the same time the *ecclesia* gained the right to elect the ten generals.<sup>4</sup> In this way the people exercised some control over the military policy of the state. A body so powerful in the state would not be satisfied to remain without independent judicial functions.

The decree, as Cloché<sup>5</sup> points out, grants to the people in "full" assembly jurisdiction in capital cases. The "full"

<sup>1</sup> Aristotle *Ath. Pol.* xxii. 2.

<sup>2</sup> *CIA* iv. (1) 27 a. 10; Hicks and Hill, *Greek Historical Inscriptions*, No. 40.

*οὐδ' ἐπιφσηφίω κατὰ ἀπροσκλήτου οὔτε κατὰ τοῦ κοινοῦ οὔτε κατὰ ἰδιώτου οὐδέ τις, . . .*

Cf. Robertson, *The Administration of Justice in the Athenian Empire*, pp. 39-40. The word *ἐπιφσηφίω* refers "to the councillors when acting as *prytaneis*, in which capacity they would preside at trials by the process of *εἰσαγγελία*."

<sup>3</sup> Cf. Cloché, *Rev. d. études grecques*, XXXIII, 34. Cf. *infra*, p. 344.

<sup>4</sup> Aristotle *Ath. Pol.* xxii. 2.

<sup>5</sup> *Op. cit.*, p. 29.

assembly also had the right to inflict fines. The decree was doubtless intended merely to regulate and restrict the exercise of powers conferred by earlier legislation, the "new laws" of 508-507 B.C., when ostracism was introduced.<sup>1</sup> The experience of a few years would naturally suggest improvements. The fact that the law was re-enacted in 410 favors the view that it was a comprehensive piece of legislation, safeguarding the exercise of sovereign powers by the *boulé* and the assembly and regulating their relations to each other.

Another early law regarding the exercise of judicial functions by the assembly is the so-called "decree of Cannonus."<sup>2</sup> The primitive nature of the law suggests the possibility that it was the actual decree that first conferred independent jurisdiction on the assembled people. Its provisions, as given by Xenophon,<sup>3</sup> are as follows:

ἴστε δέ, ὦ ἄνδρες Ἀθηναῖοι, πάντες ὅτι τὸ Κανωνοῦ ψήφισμά ἐστιν ἰσχυρότατον, ὃ κελεύει, ἔάν τις τὸν τῶν Ἀθηναίων δῆμον ἀδικῇ, δεδεμένον ἀποδικεῖν ἐν τῷ δήμῳ, καὶ ἔάν καταγνωσθῇ ἀδικεῖν, ἀποθανεῖν εἰς τὸ βάραθρον ἐμβληθέντα, τὰ δὲ χρήματα αὐτοῦ δημευθῆναι καὶ τῆς θεοῦ τὸ ἐπιδέκατον εἶναι. κατὰ τοῦτο τὸ ψήφισμα κελεύω κρίνεσθαι τοὺς στρατηγούς καὶ νῆ Δία, ἂν ὑμῖν γε δοκῇ, πρῶτον Περικλέα τὸν ἐμοὶ προσήκοντα· αἰσχρὸν γάρ μοι ἐστὶν ἐκείνον περὶ πλείονος ποιεῖσθαι ἢ τὴν ὅλην πόλιν.

Xenophon, following the usual practice, is paraphrasing rather than reproducing, the exact wording of the law. Instead of *δεδεμένον*, Aristophanes uses *διαλελημμένον* in his reference to the decree of Cannonus in the *Ecclesiazousae*,<sup>4</sup> which the scholiast explains as *κατεχόμενον ἐκατέρωθεν*. Xenophon may have substituted *δεδεμένον* for the unusual form *διαλελημμένον* of the original text of the law. It has been suggested that *δεδεμένον* was a gloss which found its way into the text.<sup>5</sup> In any event, it seems likely that

<sup>1</sup> For the date of the introduction of ostracism, cf. Carcopino, *op. cit.*, p. 106. Cf. *supra*, p. 195.

<sup>2</sup> "Aus älterer Zeit stammt offenbar das Psephism des Kannonos."—Busolt-Swoboda, *op. cit.*, p. 884, n. 1.

<sup>3</sup> Xenophon *Hell.* i. 7. 20.

<sup>4</sup> 1089-90. *τοῦτ' ἐπὶ τὸ πρᾶγμα κατὰ τὸ Κανωνοῦ σαφῶς ψήφισμα, βινεῖν δεῖ με διαλελημμένον.*

<sup>5</sup> Bamberg, *Hermes*, XIII, 510. Cf. Rose, "Das Psephisma des Kannonos," *Commentationes philologicae*, pp. 83 ff., who quotes all the ancient sources in full and cites the literature up to 1891. Lipsius (*op. cit.*, p. 43, n. 132) approves of Bamberg's

Aristophanes' *διαλελημμένον* is the original word. The audience, seeing the young man on the stage beset on either side by an antique female, would be in no doubt as to the meaning of *διαλελημμένον*. This method of securing a prisoner is surely a survival. In primitive communities a public offender would be dragged unceremoniously by his accusers into the agora to face an outraged community, and held until his fate was duly determined.<sup>1</sup> His defense would be made with his accusers still clinging to him. The method of execution—hurling into the barathron—is obviously ancient. It is probably a convenient substitute for the earliest form of community punishment, stoning. In the fifth century the hemlock had largely taken the place of the barathron,<sup>2</sup> but execution by hurling into the barathron had never been abolished. It could still be used when authorized by special decree.<sup>3</sup> The barathron, however, continued to be used for the disposal of the bodies of certain types of criminals. The language of the decree, so far as it can be recovered, bears evidence of antiquity in the occurrence of one unusual, if not obsolete, word, *ἀποδικεῖν*, and one unusual form, *διαλελημμένον*, instead of

*διαλελημμένον* but rather prefers *διειλημμένον* suggested by Rose. Hesychius's *Κανωνοῦ ψήφισμα* gives *διειλημμένον*. But *διαλελημμένον* is to be preferred not only because it is found in Aristophanes but because the older form of the participle fits better into the context with the unusual word *ἀποδικεῖν*. Provision was made by the decree for adequate time for defense. *Κρατῖνος* (*Κράτερος*, Dindorf) *δὲ καὶ πρὸς κλεψύδραν κελεύσαι*.—Scholiast on Aristophanes. It need not be assumed that the words *πρὸς κλεψύδραν* occurred in the decree, but there is no indication that provision was made for separate trials as Grote (*op. cit.*, VIII, 196 ff.) insisted. Cf. Rose, *op. cit.*, p. 89.

<sup>1</sup> Cf. Vergil *Aeneid* II. 57–58, for the capture and examination of Sinon:

"Ecce, manus juvenem interea post terga revinctum  
Pastores magno ad regem clamore trahebant."

<sup>2</sup> The Thirty used the hemlock in their executions (Lysias xii. 17). Lipsius (*op. cit.*, p. 77, n. 101) thinks the Thirty introduced the hemlock. But prohibition of burial in Attic territory in the case of Antiphon seems to indicate that he drank the hemlock. A criminal cast into the barathron would not be removed for burial anywhere. Cf. Plato *Republic*, 439 E. Cf. Hager, "How Were the Bodies of Criminals Disposed of after Death?" *Jour. of Philol.*, VIII, 1 ff. The mention of *κάνειον* in Aristophanes shows that it was well known in 405 B.C. as a means of committing suicide (*Frogs*, 123 ff.).

<sup>3</sup> For examples of such decrees, see Lycurgus i. 121 and Deinarchus i. 62. Cf. Thonissen, *Le droit penal de la république athénienne*, pp. 97 ff.; Thalheim, *s.v.* "Barathron," in Pauly-Wissowa; Caillemer, *s.v.* "Barathron" in Daremberg-Saglio.

διειλημμένον. The word ἀποδικεῖν occurs only here in the literature of the classical period.<sup>1</sup>

The decree of Cannonus was well known to the Athenians. "You all know, men of Athens," says Eurypotlemus, "that the decree of Cannonus is most severe" (ισχυρότατον). Aristophanes jests about it as if it were quite familiar to his audience; and when Ischomachus in the *Oeconomicus*<sup>2</sup> half humorously tells Socrates how his wife on different occasions held him to account, his use of the word διειλημμένως shows that he had in mind the decree of Cannonus: ἥδη δ' ἔφη, ὦ Σώκρατες, καὶ διειλημμένως πολλάκις ἐκρίθην ὅτι χρή παθεῖν ἢ ἀποτίσαι. ὑπὸ τοῦ ἔφην ἐγώ, ὦ Ἰσχόμαχε; ἐμὲ γὰρ δὴ τοῦτο ἐλάνθανεν. ὑπὸ τῆς γυναικός, ἔφη.

The notoriety of the decree, like that of the laws of Draco, was in part due to the harshness of the punishment and in part to its antiquity. The language of the decree and the primitive method of securing and punishing the culprit point to an early legal formulation of ancient community methods of dealing with public offenders.

Some features of the trial of Miltiades suggest the decree of Cannonus. According to Plato,<sup>3</sup> Miltiades would have been executed by being cast into the barathron had he been finally condemned to death. "The Athenians voted that Miltiades, the hero of Marathon, should be thrown into the pit of death [βάραθρον], and he was only saved by the chief Prytanis." Miltiades was specifically charged with deceiving the people (ἀπάτη τοῦ δήμου),<sup>4</sup> while the decree of Cannonus was enacted to deal with ἀδικία. But ἀπάτη is simply

<sup>1</sup> Suidas cites ἀποδικεῖν as being used by Antiphanes for ἀπολογεῖσθαι. It is now generally believed that Antiphon was meant. Antiphon displayed a preference for antique or poetical words on occasion to render his speech more impressive, e.g., ἀπιστέω = ἀπειθέω. Cf. Rose, *op. cit.*, p. 89.

<sup>2</sup> xi. 25. Cf. Rose, *op. cit.*, p. 87.

<sup>3</sup> *Gorgias*, 516 E: Μιλτιάδην δὲ τὸν ἐν Μαραθῶνι εἰς τὸ βάραθρον ἐμβαλεῖν ἐψηφίσαντο, καὶ εἰ μὴ διὰ τὸν πρύτανιν ἐνέπεσεν αὐν; καίτοι οὗτοι, εἰ ἦσαν ἄνδρες ἀγαθοί, ὥς σὺ φῆς, οὐκ ἂν ποτε ταῦτα ἐπασχον.

<sup>4</sup> Herodotus vi. 136: Ἀθηναῖοι δὲ ἐκ Πάρου Μιλτιάδεα ἀπονοστήσαντα εἶχον ἐν στόμασι, οἱ τε ἄλλοι καὶ μάλιστα Ξάνθικπος ὁ Ἀρίφρονος, ὃς θανάτου ὑπαγαγὼν ὑπὸ τὸν δῆμον Μιλτιάδεα ἐδῶκε τῆς Ἀθηναίων ἀπάτης εἵνεκεν. Μιλτιάδης δὲ αὐτὸς μὲν παρῶν οὐκ ἀπελογέτο (ἦν γὰρ ἀδύνατος ὥστε σηπομένου τοῦ μηροῦ), προκειμένου δὲ αὐτοῦ ἐν κλίνῃ ὑπεραπελογέοντο οἱ φίλοι.



a particular form of *ἀδικία*. As Miltiades, suffering from a wound, was carried into the assembly on a couch, he was not secured in the usual way.

If these considerations are valid, the date of the decree is not later than 489 B.C., the year of Miltiades' trial,<sup>1</sup> and may be as early as 508–507, when ostracism and other new laws were introduced. It would seem strange to permit the assembly to banish a man suspected of designs of establishing a tyranny and not give it the power to try one who was accused of actual wrongdoing (*ἀδικία*) to the community.

The law of Cannonus provided for the trial by the ecclesia of those charged with "doing wrong to the people"<sup>2</sup> (*ἐάν τις τὸν τῶν Ἀθηναίων δῆμον ἀδικῇ*). It was a general charge intended to cover every conceivable kind of offense. There was no attempt made to define *ἀδικία*. It was left to the ecclesia to determine whether the offense in question amounted to *ἀδικία*. But other laws were soon enacted naming specific offenses. Miltiades, for example, was charged with "deceiving the people"<sup>3</sup> (*τῆς Ἀθηναίων ἀπάτης εἵνεκεν*). This particular kind of offense would be amply covered by *ἀδικία*. But Demosthenes refers to an ancient (*ἀρχαῖος*) law providing for the trial of those charged with deceiving the people by means of false promises. The case came before the ecclesia, and the penalty was death.<sup>4</sup> This is precisely the offense with which Miltiades was charged, and Lipsius has suggested that the law mentioned by Demosthenes was in force at

<sup>1</sup> Rose (*op. cit.*, p. 93) believes that Miltiades was tried according to the decree of Cannonus. There is no need to try to twist Herodotus' *κατὰ τὴν ἀδικίην* into a reference to a charge of *ἀδικία*, as in the decree of Cannonus, to support this view as Bohm (*De εὐαγγελισμῷ*, p. 22) does. Lipsius (*op. cit.*, p. 43, n. 132), "nach der Altertümlichkeit von Inhalt wie Ausdruck" puts it not later than the middle of the fifth century, but he offers no convincing arguments against the view of Rose. The decree of Cannonus fixed the punishment in case of conviction. But there is no need to assume with How and Wells (*op. cit.*) that the trial of Miltiades was an *ἐγὼν τιμητός*. Cf. Shuckburg, *Herodotus*, VI, note *ad loc.*

<sup>2</sup> In later practice, indictments regularly charged *ἀδικία*. The particulars which followed indicated the nature of the "wrongdoing." Compare the indictment of Socrates as given by Diogenes Laertius ii. 40: *Ἀδικεῖ Σωκράτης, οὗς μὲν ἡ πόλις νομίζει θεοὺς οὐ νομίζων, ἕτερα δὲ καὶνὰ δαιμόνια εἰσηγούμενος· ἀδικεῖ δὲ καὶ τοὺς νέους διαφθείρων. Τίμημα θάνατος.*

<sup>3</sup> Cf. *supra*, p. 197.

<sup>4</sup> Demosthenes xx. 135; xlix. 67.

that time. This is entirely possible; it is in accordance with the natural tendency of legal development to pass special laws dealing with offenses that are particularly injurious to the community. The history of the νόμος εἰσαγγελτικός fully illustrates this tendency. But the version of the law against deception of the people given by Demosthenes can scarcely be the original law if it belonged to the age of Cleisthenes: νόμος ὑμῖν ἔάν τις ὑποσχόμενός τι τὸν δῆμον ἢ τὴν βουλὴν ἢ δικαστήριον ἐξαπατήσῃ τὰ ἔσχατα πάσχειν.<sup>1</sup> One would expect to find ἡλιαία rather than δικαστήριον. But even if the dicasteries were already organized, it is wholly unlikely that at this early date the deceiving of law courts was common enough to be prejudicial to the public interest. The sycophants came later. But there is no reason why the original law—ἔάν τις ὑποσχόμενός τι τὸν δῆμον ἐξαπατήσῃ—may not have been revised at a later time to include the boulé and the heliastic courts.

Reverting to the question of a quorum in the ecclesia, we find that πλήρης δῆμος was used in an essay on Athenian democracy, attributed to Xenophon, in what is clearly a technical sense.<sup>2</sup> The writer does not define it, but it has

<sup>1</sup> xx. 100. Cf. Lipsius, *op. cit.*, p. 180.

<sup>2</sup> (Xenophon) *Ath. Pol.* ii. 17, edition of Marchant in "Oxford Classical Texts": "Ἐτι δὲ συμμαχίας καὶ τοὺς ὅρκους ταῖς μὲν ὀλιγαρχουμέναις πόλεσιν ἀνάγκη ἐμπεδοῦν· ἦν δὲ μὴ ἐμμένωσι ταῖς συνθήκαις, ἢ ὕψ' ὅτου ἀδικεῖ νόματα ἀπὸ τῶν ὀλίγων οἱ συνθέντο· ἄσσα δ' ἂν ὁ δῆμος σύνθηται, ἔξεστιν αὐτῷ ἐνὶ ἀνατιθέντι τὴν αἰτίαν τῷ λέγοντι καὶ τῷ ἐπιψηφίσαντι ἀρνεῖσθαι τοῖς ἄλλοις ὅτι οὐ παρῆν οὐδὲ ἀρέσκει ἔμοιγε, ἃ συγκείμενα πυνθάνονται ἐν πλήρει τῷ δήμῳ, καὶ εἰ μὴ δόξαι εἶναι ταῦτα, προφάσεις μυρίας ἐξήρτηκε τοῦ μὴ ποιεῖν ὅσα ἂν μὴ βούλωνται."

The passage as it appears in Marchant's edition is translated by Petch, under the title "The Old Oligarch," as follows:

"Again oligarchical states must abide by their alliances and oaths. If they do not keep to the agreement *penalties can be exacted* from the few who made it. But whenever the commons makes an agreement it can lay the blame on the individual speaker or proposer, and say to the other party that it was not present and does not approve what they know was agreed upon in full assembly; and should it be decided that this is not so, the commons has discovered a hundred excuses for not doing what they may not wish to do."

Kalinka reads οὐδὲ ἀρέσκει οἱ, εἰ γε μὴ [τὰ] συγκείμενα πυνθάνονται ἐν πλήρει τῷ δήμῳ instead of Marchant's οὐδὲ ἀρέσκει ἔμοιγε, ἃ συγκείμενα πυνθάνονται ἐν πλήρει τῷ δήμῳ. Brooks, who translates Kalinka's text under the title "An Athenian Critic of Athenian Democracy," renders the passage as follows:

"But whatever engagements the people enters upon, it is possible for it, attributing the responsibility to the individual speaker or to the chairman who put the

been satisfactorily identified with *δῆμος πληθύνων*.<sup>1</sup> It is charged in the treatise that democracies are irresponsible and untrustworthy in comparison with oligarchies. They are always trying to evade their obligations to other states. The text of the paragraph is corrupt at a critical point, but it is clear that certain measures had to be adopted by a "full" assembly. The reference to an oath, *συμμαχίαι, συνθήκαι*, and the words *συγκείμενα ἐν πλήρει τῷ δήμῳ*, used to describe the measures in question, serve to identify them as treaties and alliances, which were always ratified by oaths sworn in the name of the whole people.<sup>2</sup> *πλήρης* must be a current equivalent of *πληθύνων* used in a technical sense with *δῆμος*.

In the *Ecclesiazousae*<sup>3</sup> Aristophanes uses the words *πλήρης δῆμος*.

#### SECOND WOMAN

A little spinning while the Assembly fills [*πληρουμένης τῆς ἐκκλησίας*].

#### PRAXAGORA

Fills? Miserable woman!

S. W. Yes, why not?

O I can spin and listen just as well.

#### PRAX.

Fancy you spinning! when you must not have

The tiniest morsel of your person seen.

T'were a fine scrape, if when the Assembly's full [*εἰ πλήρης τύχοι ὁ δῆμος ὧν*],

Some woman clambering o'er the seats, and throwing

Her cloak awry, should show that she's a woman.

question, to tell others that the people itself was not present, and does not give its approval, unless it learns of arrangements in a full assembly; and if it should not seem good for these arrangements to be carried out it has discovered, etc."

Kalinka's own version is as follows:

"Was aber das Volk vereinbart hat, da steht es ihm frei, einem die Schuld zuzuschieben, dem Antragsteller und dem Versammlungsleiter, den Übrigen aber, zu erklären, er sei nicht dabei gewesen und es sage ihm nicht zu, ausgenommen höchstens, sie hätten erfahren, es sei in einer Vollversammlung des Volkes vereinbart worden; und wenn es ihm nicht belieben sollte, dass dies Gültigkeit habe, u.s.w."

<sup>1</sup> Müller-Strübing, "*Ἀθηναίων πολιτεία*, Die attische Schrift vom Staat der Athener; Untersuchungen, neue Textrecension und Paraphrase." *Philologus*, IV (1880), Supplementband, 1 ff. Kalinka (*Die Pseudoxenophontische Ἀθηναίων πολιτεία*, p. 239) puts the quorum at 6,000 but limits the occasions requiring a quorum to νόμοι ἐπ' ἀνδρῶν and ostracism.

<sup>2</sup> Cf. Kalinka, *op. cit.*, p. 235, with notes.

<sup>3</sup> 88-97, Roger's translation.

Apparently the words *πληρουμένης* and *πλήρης* are used in the normal literal sense. The meeting of the assembly and the subject for deliberation, *περί σωτηρίας*, had been announced in advance. A great crowd assembled for the meeting. The extra crowd would seem to be accounted for sufficiently by the attendance of the women, but the words of Blepyrus and Chremes suggest the possibility of a technical use of the word.

BL.

Whatever was it though that brought together  
So vast a crowd so early?

CHR.

'Twas determined  
To put this question to the assembled people,  
"How best to save the state" [*περί σωτηρίας*].<sup>1</sup>

A debate, *περί σωτηρίας*, was a matter of great public interest and not infrequent occurrence. Dionysus in the *Frogs* asked Euripides and Aeschylus to express themselves *περί τὴν πόλεως σωτηρίαν*.<sup>2</sup>

Isocrates<sup>3</sup> published his essay which he called *Λόγος Ἀρεοπαγιτικός* in the guise of a speech in the assembly *περί σωτηρίας*. And Wilamowitz<sup>4</sup> supposes that the political commission appointed in 411 B.C. was instructed to formulate measures *περί τῆς σωτηρίας*. But the "public safety" does not appear either in the fragmentary decree, *CIA* i. 57, or in Aristotle's<sup>5</sup> list of topics for discussion in the regular meetings of the *ecclesia*. But in neither case is the list complete. The subject of the safety of the state would naturally attract a great deal of public attention, especially if constitutional changes were contemplated; and it would be entirely reasonable to require that changes in the constitution be adopted by a "full" assembly (*δῆμος πλήρης* or *πληθύων*).

It is somewhat surprising that there are no other references in the literary or epigraphical sources to a quorum. There are, however, some references by implication. Fränkel<sup>6</sup> has advanced the theory that "all Athenians" and "six thousand Athenians" are in certain connections equivalent

<sup>1</sup> *Ibid.*, 394-97.

<sup>2</sup> 1435-36.

<sup>3</sup> vii. 1.

<sup>4</sup> *Op. cit.*, I, 102.

<sup>5</sup> *Ath. Pol.* xliii. 4.

<sup>6</sup> *Die attischen Geschworenengerichte*, pp. 16 ff.

expressions. He cites a passage from Demosthenes<sup>1</sup> dealing with the granting of immunity (*ἄδεια*), in which the condition *μὴ ἔλαττον ἢ ἑξακισχιλίων ψηφισαμένων* is repeated by *εἰ πᾶσιν Ἀθηναίοις ἐδόκει*. Another example of this technical use of "all Athenians" as the equivalent of "six thousand Athenians" he finds in the trial of the generals by the ecclesia in 406 B.C. The senate was instructed by the ecclesia to bring in a decree providing for the trial. The decree introduced by Callixenus which was finally passed contained the words *διαψηφίσασθαι Ἀθηναίους πάντας κατὰ φυλάς*.<sup>2</sup> An equally good example of this technical use of "all Athenians" which was not noticed by Fränkel is found in Lysias. At the end of the Peloponnesian War oligarchic plotters with the aid of a corrupt *boulé* sought to get rid of prominent democratic opponents. Agoratus, an unscrupulous informer, was induced to lay information against them in the *boulé*.<sup>3</sup> By action of the *boulé* he was taken before "the ecclesia which met in the theater in Munychia"<sup>4</sup> where he repeated his information. The ecclesia voted to turn over the accused to a court of 2,000 *dicasts* for trial. But before the case could be tried, as provided, the Thirty were installed and the accused were tried and condemned by the *boulé*. Upon the restoration of democracy, Agoratus was brought to trial charged with being responsible for the death of these men. The prosecutor, on calling up Agoratus for interrogation, remarked *καὶ μοι ἀπόκριναι, ὦ Ἀγόρατε· οὐ γὰρ οἶμαί σε ἔξαρνον γενήσεσθαι ἂν ἐναντίον Ἀθηναίων ἀπάντων ἐποίησας*.<sup>5</sup> The phrase *Ἀθηναίων ἀπάντων* manifestly refers to the Athenians present when Agoratus gave his information in the ecclesia. Now it so happens that later in the speech the prosecutor refers to the granting of immunity (*ἄδεια*) to a certain Menestratus whose

<sup>1</sup> xxiv. 46 and 48.

<sup>2</sup> Xenophon *Hellenica* i. 7. 9.

<sup>3</sup> Lysias xiii. 18-36 for the case against Agoratus.

<sup>4</sup> *Ibid.*, 32.

<sup>5</sup> *Ibid.*, The recurrence of the words *ἐναντίον Ἀθηναίων ἀπάντων* in a later part (86) of the speech would seem to show pretty clearly that the phrasing of the idea of the widest possible publicity is not casual and accidental but intentional and technical.

name was included in the list furnished by Agoratus. Menestratus was at once taken into custody by authority of the *boulé*;<sup>1</sup> but when "the ecclesia met in the theater in Munychia" Hagnodorus, a fellow-demesman of Menestratus and a relative of Critias, secured immunity for Menestratus who thereupon appeared as an informer in the ecclesia and added new names to the list of accused. It is not expressly said that the assembly before which Agoratus appeared granted immunity to Menestratus. But with good reason the identity is assumed.<sup>2</sup> The designation *ἡ ἐκκλησία Μουνυχίασιν ἐν τῷ θεάτρῳ* used in both cases<sup>3</sup> shows that one assembly handled both. Now *ἄδεια* could be granted only by an assembly of at least 6,000.<sup>4</sup> Consequently we have another instance of the equivalency of "all Athenians" and "six thousand Athenians." Still another example of this usage which Fränkel does not cite in this connection is found in Harpocration, *s.v.* "Ἀρδηττος, the place where πάντες ὤμνουν Ἀθηναῖοι τὸν ὄρκον τὸν ἡλιαστικόν."<sup>5</sup> Owing to the age requirement in the case of the *δικασταί*, it is true that 6,000 *δικασταί* would not be identical with 6,000 *ἐκκλησιασταί*;<sup>6</sup> but as both groups represented the whole people in different spheres, they could both be called πάντες Ἀθηναῖοι. In the Harpocration passage, πάντες Ἀθηναῖοι could not literally mean "all Athenians," for only 6,000 of those possessing the requisite age qualification could take the oath.

<sup>1</sup> *Ibid.*, 55. ὁ Μενέστρατος οὗτος ἀπεγράφη ὑπὸ τοῦ Ἀγοράτου καὶ συλληφθεὶς ἐδέδετο. Only the names of the generals and taxiarchs were laid before the ecclesia. The *boulé* dealt with the others. περὶ δὲ τῶν ἄλλων ἀπέχρη ἐν τῇ βουλῇ [μήνυσις] μόνη γεγενημένη (32).

<sup>2</sup> Cf. Boerner, *De Rebus a Graecis inde ab Anno 410 usque ad Annum 403 A. Chr. N. Gestis*, p. 48; Grote, *op. cit.*, VIII, 210; Meyer, *op. cit.*, IV<sup>2</sup>, p. 666; Thalheim, note on Lysias xiii. 55.

<sup>3</sup> Lysias xii. 32 and 55.

<sup>4</sup> Demosthenes xxiv. 46.

<sup>5</sup> Fränkel, *op. cit.*, pp. 19-20, uses this passage to prove that "jeder Athener über dreissig Jahre von selbst Heliast war." All he had to do was to offer himself and prove that he possessed the requisite qualifications. In this sense the dicasts were "all Athenians." But they were "all Athenians" rather because in the sphere of the administration of justice they represented the Athenian people.

<sup>6</sup> Cf. Bruck, "Über die Organisation der Athenischen Heliastengerichte im 4. Jahrh. v. Chr.," *Philologus*, LII, 314; Bamberg, *Hermes*, XIII (1878), 505.

Andocides<sup>1</sup> cites a law enacted in 410 B.C. providing that "all Athenians" should take a solemn oath by tribes and demes to do all in their power to destroy subverters of democracy. ὁμόσαι δ' Ἀθηναίους ἅπαντας καθ' ἱερῶν τελείων, κατὰ φυλάς καὶ κατὰ δήμους ἀποκτενεῖν, κ.τ.λ. The words Ἀθηναίους ἅπαντας are neither strictly technical nor wholly literal. The proposed oath was in effect a pledge of loyalty to the restored democracy. It was desirable that as many as possible, even all, should participate in the ceremony. Hence it was to be administered in the ecclesia and in the deme assemblies (κατὰ φυλάς καὶ κατὰ δήμους). But there was no question of a quorum or constitutional validity involved. Each man who took the oath was bound, whether few or many participated. In a sense the words "all Athenians" were used literally, but there was an echo of their technical significance that really supports the theory of Fränkel. The similarity to the phraseology of the decree of Callixenus can scarcely be accidental.<sup>2</sup> Gilbert<sup>3</sup> thought the theory was open to question because it had so little support in the sources. It is hoped that these additional instances of the identity of "six thousand Athenians" and "all Athenians" may serve to minimize, if not remove, this objection.

The Athenian practice in the matter of ratifying by oath treaties and other public agreements was not uniform. But in at least one instance the state was represented by 6,000 citizens in the persons of the dicasts for the current year.<sup>4</sup> In the act of settlement of 446 B.C. concerning Chalcis in Euboea, all adult male Chalcidians were required to take an oath of allegiance, while the Athenian senators and dicasts (6,000) swore on behalf of the Athenians to respect certain specified rights of the Chalcidians. Some scholars

<sup>1</sup> i. 97.

<sup>2</sup> Xenophon *Hellenica*, i. 7. 9. διαψηφίσασθαι Ἀθηναίους ἅπαντας κατὰ φυλάς.

<sup>3</sup> *Op. cit.*, p. 308.

<sup>4</sup> *CIA* iv. (1) 27a. Hicks and Hill, *op. cit.*, No. 40; Dittenberger, *Sylloge*<sup>2</sup>, I, 17. Cf. Robertson, *op. cit.*, pp. 36-47, for a full discussion of the purport and purpose of the oath. Cf. Fränkel, *op. cit.*, pp. 45 and 51. The boulé and the generals and other magistrates regularly took the oath. Cf. Dittenberger, *op. cit.*, I, 36. For reasons for the change in this case, see Fränkel, *op. cit.*, pp. 50-51.

argue that the senators and dicasts bound only themselves and that the intention was to leave the assembly a free hand. Some ground for this view is found in the circumstance that the content of the oath deals mainly with legal matters. But, as has been pointed out,<sup>1</sup> the first term of the oath deals with a matter that was entirely outside the province of either the *boulé* or the dicasts. It refers not to banishment by the sentence of a court but to the deportation of the whole population, which would require a decree of the *ecclesia*. Furthermore, since the entire citizen body of Chalcis was to swear, it was only natural that the Athenians on their part should bind themselves by the oath of a really representative group of citizens. Such a group would naturally correspond in numbers to the quorum of the *ecclesia*. And the 6,000 dicasts were easier to identify and assemble than any other 6,000 members of the *ecclesia*.

The elaborate efforts made by the authorities to enforce attendance in the *ecclesia* all point to a quorum requirement. In the *Acharnians* of Aristophanes,<sup>2</sup> presented in the year 425 B.C., Dicaeopolis complains that, although it is the morning for the meeting of the "principal" assembly (*κυρία ἐκκλησία*) of the month, the benches are empty and the people are chattering in the agora, scurrying about to avoid the vermilion-painted rope. The scholiast on this passage remarks, ὑπὲρ τοῦ ἐξ ἀνάγκης αὐτοὺς εἰς τὰς ἐκκλησίας συνιέναι τοῦτο ἐμνηχανῶντο καὶ πολλὰ ἔλλα. Archers under the direction of six lexiarchs and their thirty assistants shut up the booths in the market place, closed up the streets that did not lead to the Pnyx, and by means of smeared ropes tried to force the loiterers to attend the *ecclesia*.<sup>3</sup> The scholiast says that those who were marked were subject to a fine.<sup>4</sup> The difficulty of inducing attendance in the *ecclesia* was in part

<sup>1</sup> Robertson, *op. cit.*, pp. 40 f. Cf. *infra*, p. 340, for the wording of the oath.

<sup>2</sup> 19-20.

<sup>3</sup> Pollux viii. 104, and the scholiast on Aristophanes' *Acharnians*, 22. Cf. Gilbert, *Greek Constitutional Antiquities*, p. 289. For a different explanation of the painted rope, see Wilamowitz, *Aus Kydathen*, p. 165, n. 77.

<sup>4</sup> The scholiast must be wrong about the fine, for, since attendance was not compulsory, there was no ground of complaint.



responsible for the institution of pay for attendance. Aristotle says:

At first they refused to allow pay for attendance at the assembly; but the result was that the people did not attend. Consequently after the Prytaneis had tried many devices in vain in order to induce the populace [τὸ πλῆθος] to come and ratify the votes Agyrrhius made provision of one obol a day.<sup>1</sup>

Whether τὸ πλῆθος, be taken in the sense of "populace" or in the sense of "the number,"<sup>2</sup> meaning "quorum," the general impression made upon the reader is that there was an urgent reason for the various measures taken to secure the attendance of as many as possible. The phrase πρὸς τὴν ἐπικύρωσιν τῆς χειροτονίας clearly implies that a vote might be taken under circumstances that would render it invalid. The difference could be only numerical.

There is practically no evidence as to the numbers that habitually attended the meetings of the ecclesia. One inscription records a vote of 3,616.<sup>3</sup> After the consummation of the revolution of 411 B.C. a committee was sent to Samos to reassure the army regarding the intentions of the revolutionists. In attempting to justify their proposed restriction of the number of citizens to 5,000, they said that "because of their military expeditions and their activities abroad the Athenians had never yet come to consult upon any matter so important that 5,000 had assembled."<sup>4</sup> This statement is propaganda. In all probability it is an exaggeration. "Never yet" is much too strong. The effect of the Spartan invasions during the earlier years of the war was to drive the country people into the city. The regular population of the city was increased far beyond its housing capacity. The

<sup>1</sup> *Ath. Pol.* xli. 3: μισθοφόρον δ' ἐκκλησίαν τὸ μὲν πρῶτον ἀπέγνωσαν ποιεῖν· οὐ συλλεγομένων δ' εἰς τὴν ἐκκλησίαν, ἀλλὰ πολλὰ σοφισομένων τῶν πρυτάνεων, ὅπως προσιστῆται τὸ πλῆθος πρὸς τὴν ἐπικύρωσιν τῆς χειροτονίας, πρῶτον μὲν Ἀγύρριος ὀβολὸν ἐπόρισεν, μετὰ δὲ τοῦτον Ἡρακλείδης ὁ Κλαζομένιος ὁ βασιλεὺς ἐπικαλούμενος διώβολον, πάλιν δ' Ἀγύρριος τριώβολον.

<sup>2</sup> Mathieu and Haussoullier (Budé edition), translate ὅπως προσιστῆται τὸ πλῆθος πρὸς τὴν ἐπικύρωσιν τῆς χειροτονίας "afin d'obtenir le nombre nécessaire pour rendre valable le vote." Kenyon and Kaibel and Kiessling translate τὸ πλῆθος as "the populace" and "das Volk," respectively.

<sup>3</sup> Thalheim, in Pauly-Wissowa, s.v. *δικασταί*.

<sup>4</sup> Thucydides viii. 72.

occupation of Decelea forced the remaining population of the outlying demes to take refuge in the city. In spite of military service and casualties, it is doubtful if fewer citizens were available for service in the *ecclesia* than when the country people lived at peace on their farms and resorted to the city only periodically. At any rate, Andocides mentions a dicastery of 6,000 in 415 B.C.<sup>1</sup> And the ostracism of Hyperboulus<sup>2</sup> in 418 required the presence of at least 6,000. There are references to assemblies elsewhere in Greece with a minimum attendance requirement. In Magnesia<sup>3</sup> such an assembly was called *κυρία*. The quorum was 600. In some Delphian inscriptions the formulas *σὺν ψάφοις ταῖς ἐν νόμοις* and *σὺν ψάφῳ τῇ ἐν νόμῳ* occur. As *νόμαιος* and *ἐννομος* are found as synonyms<sup>4</sup> of *κύριος*, it seems that in Delphi also a quorum was required for certain purposes. The number is not mentioned.

In Athens certain assemblies were called *κυρίαί*. In view of the well-known reluctance of the Athenians to attend meetings of the *ecclesia*, the securing of a quorum could hardly have been left to chance. It is not to be supposed that the *prytaneis* in making up the program for an assembly meeting included each time, if the occasion arose, matters that had to be dealt with by a *δῆμος πλεθύνων* on the chance that a quorum might be present. Such a haphazard way of managing the public business would surely have been intolerable. The resulting inconvenience, if a quorum failed to appear, would have been serious. This difficulty appears to have been in part obviated by specifying certain recurring meetings of the assembly at which efforts were made to secure an adequate attendance. The programs of these meetings were reserved for those measures that required a quorum. Two types of assembly are mentioned in the early inscription quoted above.<sup>5</sup> One is called simply *ἐκκλησία*; the other is called *δῆμος πλεθύνων*. There are indications that in the fifth century the regularly recurring meeting, at which measures requiring a quorum were presented, was the *κυρία ἐκκλησία*.

<sup>1</sup> Andocides i. 17.

<sup>3</sup> Thalheim, *op. cit.*, p. 2170.

<sup>2</sup> Carcopino, *op. cit.*, p. 221.

<sup>4</sup> *Ibid.*, p. 2165.

<sup>5</sup> *CIA* i. 57. Cf. *supra*, p. 201.

There was some uncertainty, even in ancient times, as to which assemblies were properly called *κύριαι*. Scholiasts and lexicographers are divided.<sup>1</sup> According to one view, one assembly in each prytany was the *κυρία*. According to the other view, the four regular assemblies of each prytany were called *κύριαι*, to distinguish them from the special meetings. But Aristotle<sup>2</sup> seems to say quite definitely that only the first assembly was called *κυρία*. The lexicographers who drew their information from him so understood him. But this does not settle the matter to the satisfaction of all; there is a complication. Aristotle, in his account of the business discussed at the regular meetings, says that ambassadors were to be introduced at the third and fourth meetings. This seems to be at variance with Aristophanes, who, in the *Acharnians*,<sup>3</sup> represents Athenian ambassadors making their reports in a *κυρία* assembly. Consequently an attempt has been made to interpret Aristotle as meaning that the four regular meetings were called *κύριαι*.<sup>4</sup> But it is useless to at-

<sup>1</sup> The scholiast on Aristophanes' *Acharnians*, 19, says that the three regular meetings per prytany were called *κύριαι*.

*κυρίας ἐκκλησίας*: Ἐν ἡ ἐκύρουν τὰ ψηφίσματα. εἰσὶ δὲ νόμιμοι ἐκκλησίαι αἱ λεγόμεναι κύριαι τρεῖς τοῦ μηνὸς Ἀθήνησιν, ἡ πρώτη καὶ ἡ δεκάτη καὶ ἡ τριακάς. εἰσὶ δὲ καὶ πρόσκλητοι συναγόμεναι κατὰ τινα ἐπείγοντα πράγματα. αἱ μὲν οὖν νόμιμοι καὶ ὠρισμένοι ἐκκλησίαι κύριαι λέγονται, ὡς ἔφαμεν, αἱ δὲ πρὸς τὸ κατεπεῖγον συναγόμεναι σύγκλητοι.

Harpocration, s.v. *κυρία ἐκκλησία*, quoting Aristotle, says: "προγράφουσι δὲ" φησι "καὶ κυρίαν ἐκκλησίαν, ἐν ἡ δέ τὰς ἀρχὰς ἀποχειροτονεῖν οἱ δοκοῦσι μὴ καλῶς ἄρχειν, καὶ περὶ φυλακῆς δὲ τῆς χώρας." καὶ τὰς εἰσαγγελίας ἐν ταύτῃ τῇ ἡμέρᾳ τοὺς βουλομένους ποιεῖσθαι φησι, καὶ τὰ ἐξῆς.

To the same effect are Suidas and Pollux viii. 95. Photius gives both views: *Κυρία ἐκκλησία*: ἐν ἡ τοὺς ἀρχοντας ἐχειροτόνουσιν ὅλον στρατηγούς, ἱπάρχους καὶ τοὺς τοιούτους· ἄλλοι δὲ φασιν καθ' ἕκαστον μῆνα ἐκκλησίας εἶναι τρεῖς, αἱ κύριαι πρὸς σύγκρισιν ἐλέγοντο τῶν συγκλήτων.

For texts of all scholia and lexicographers conveniently assembled, see Reusch, "De diebus contionum ordinariorum apud Athenienses," *Dissertationes Philologicae Argentoratenses*, III, 50-51.

<sup>2</sup> *Ath. Pol.* xliii. 4. There were four meetings per prytany, of which one was called *κυρία*. The three assemblies mentioned by the scholiast belong to the later period of the twelve tribes (Busolt-Swoboda, *op. cit.*, 987, n. 4).

<sup>3</sup> Line 61 calls for reports from Athenian ambassadors to Persia. It is true that a mission from the king is introduced to confirm the report. In line 134 the report of an embassy to Sitalces is called for. Aristotle (*Ath. Pol.* xliii. 6) seems to be talking of foreign representatives rather than Athenian embassies.

<sup>4</sup> Van Leeuwen, *Acharnians*, 19.

tempt to force this meaning upon the passage in view of Aristotle's<sup>1</sup> later statement that after the introduction of pay for attendance at the meetings of the *ekklesia* 9 obols were paid for attendance at the *κυρία ἐκκλησία*, and 6 obols for the others (*ταῖς ἄλλαις ἐκκλησίαις*). It is scarcely possible that *κυρία ἐκκλησία* should refer to the four regular meetings of the assembly and *ταῖς ἄλλαις ἐκκλησίαις* to the special meetings (*σύγκλητοι*).

It is to be observed that, while certain important measures could be dealt with only by an *ἐκκλησία κυρία*, it by no means follows that other measures also, which Aristotle assigns to the other meetings, could not be put on the program of the *κυρία*. For example, while definite provision is made for introducing ambassadors at two ordinary meetings, there is no indication that they might not be introduced in the "sovereign" assembly, as Aristophanes did in the *Acharnians*.<sup>2</sup> Epigraphical evidence favors the view that only one assembly in each prytany was called *κυρία*. Inscriptions do not show more than one *κυρία ἐκκλησία* per prytany.<sup>3</sup> The difference in the composition of the "sovereign" assembly in comparison with the others would most naturally be in the numbers in attendance. The sovereign assembly required a quorum.

There is no evidence to show when the *κυρία* assembly, as a device to secure a quorum at regular intervals, was introduced. The earliest literary reference to the *κυρία* assembly is in the *Acharnians*<sup>4</sup> of Aristophanes, presented in 425 B.C. It occurs also in a very fragmentary inscription of uncertain

<sup>1</sup> Ixii 2: *μισθοφοροῦσι δὲ πρῶτον ὁ δῆμος ταῖς μὲν ἄλλαις ἐκκλησίαις δραχμὴν, τῇ δὲ κυρίᾳ ἑννέα ὀβολούς*. *ἔπειτα τὰ δικαστήρια τρεῖς ὀβολούς· εἰθ' ἡ βουλὴ πέντε ὀβολούς*.

<sup>2</sup> Rennie, *Acharnians*, 19. Aristophanes does not gratuitously violate the rules of constitutional usage. Cf. Rogers, *Introduction to the Acharnians*, xxvii, who argues that the regular assemblies were called *κύριαι* in the time of Aristophanes and that there were three in number per month (Scholia, Demosthenes xxiv. 20). By the time of Aristotle they had been increased to four, so that the increased pay for attendance might serve as a dole for the impoverished citizens. It is to this period that the lexicographers, quoting Aristotle, refer.

<sup>3</sup> Reusch, *op. cit.*, pp. 66 f.; Gilbert, *op. cit.*, p. 285, n. 5.

<sup>4</sup> Line 19.

date,<sup>1</sup> possibly a little earlier than the *Acharnians*. There is a general similarity between the business of the *δῆμος πληθύων* as it appears in the inscription *CIA* i. 57 and that of the *κυρία ἐκκλησία* as described by Aristotle.<sup>2</sup> But such technical terms as *προβολή*, *συκοφάντης* in Aristotle show that the version of the law, organizing and distributing the business over the meetings of the ecclesia, from which he drew his information, did not originate in the time of Cleisthenes. It may belong to the reforms of Ephialtes which enlarged the functions of the ecclesia. In any event, the disappearance of *δῆμος πληθύων* or *πλήρης* from literature can be readily explained in this way. It was supplanted by the newer and more convenient *κυρία ἐκκλησία*. Even *κυρία ἐκκλησία* is rarely used outside of official documents and technical treatises. The historian and the orator refer to measures passed by the assembly without taking the trouble to specify that it was a "sovereign" assembly.

The Athenians were familiar with the *κυρία* assembly and the quorum in the demes also. There is one record of an *ἀγορά κυρία*.<sup>3</sup> Two citizens of Axione were praised and given crowns for their public services in a decree adopted *ἐν τῇ ἀγορᾷ τῇ κυρίᾳ*. There is nowhere in the sources a definition of an *ἀγορά κυρία*. There is a reference to a quorum in the deme Myrrhinus. Appeals from the decision of the auditors were permitted to an assembly of not fewer than thirty demesmen.<sup>4</sup> It seems likely that a quorum was required in the other demes, varying according to their size. There is no evidence that the quorum requirement constituted the distinction between the *ἀγορά κυρία* and the others. There is good reason for a quorum when the assembly was performing judicial functions, but an honorific decree does not seem

<sup>1</sup> *CIA* i. 25. Cf. *Reusch, op. cit.*, p. 68.

<sup>2</sup> *Ath. Pol.* xliii. 4.

<sup>3</sup> *CIA* ii. 585. 1-2. Haussoullier, *La vie municipale en Attique*, p. 6, believes that all the regular assemblies were *κύριαι*.

<sup>4</sup> *CIA* ii. 578. 21 ff.: *ὁ δήμαρχος διδόντω τὴν ψήφον ἐὰν παρῶσι μὴ ἐλάττους ἢ ΔΔΔ.*

of sufficient importance to require the attendance of a quorum.<sup>1</sup>

It is to be observed that there is no mention of *δικαστήρια* in the inscription *CIA* i. 57 as it stands. In view of its fragmentary character, it may seem hazardous to base any conclusions upon this circumstance, but the tenor of the document is against any assumption that it dealt with the judicial situation in a comprehensive manner. And nothing short of a comprehensive judicature act could have sufficed to deal with such a complicated question as the shift of judicial functions from the magistrates to the Heliaea. The new duties of the magistrates in connection with the preliminary hearings had to be defined. Not all cases went to the Heliaea under the new system. The king archon took certain cases for trial before the Areopagus;<sup>2</sup> these had to be specified. And finally there was the organization of the dicasteries. It must have been anticipated at once that a single court, the Heliaea, could not handle all the litigation of the community. It is highly improbable that these and other details were dealt with in the missing portions of the inscription. The earliest evidence of the existence of *δικαστήρια* is in the year 462-461, which constitutes a *terminus ante quem*. In that year Ephialtes "stripped the Areopagus of all the acquired prerogatives from which it derived its guardianship of the constitution, and assigned some of them to the Council of the Five Hundred, and others to the assembly and the law courts [*δικαστήρια*]."<sup>3</sup> There is no suggestion in Aristotle's words that the dicasteries were recent creations. The contrary rather is the case. In order to discredit the Areopagus in the eyes of the people, Ephialtes "brought about the ruin of many of its members by bringing actions against them with

<sup>1</sup> In the decrees of Magnesia granting *προξενίην, πολιτείην, ἐγκτήσιον, ἀτελίαν πάντων κ.τ.λ.*, it is sometimes mentioned that the measure was passed *ἐκκλησίας κυρίας γενομένης ὑπὲρ ἑξακοσίων*. The quorum was not required, but it probably enhanced the honor. Cf. Kern, *Die Inschriften von Magnesia am Maeander*, Nos. 2 and 4.

<sup>2</sup> The Areopagus continued to try cases of *ἀσέβεια*. Cf. *infra*, p. 260.

<sup>3</sup> *Ath. Pol.* xxv. 2.

reference to their administration." These actions must have been brought in the *δικαστήρια*, and the campaign must have extended over a considerable period of time.

Some years before 462-461 overseas litigation must have reached considerable proportions. Treaties providing for litigation between citizens of the contracting states (*δίκαι ἀπὸ συμβόλων*)<sup>1</sup> are quite early. Athens doubtless had such agreements with the more important commercial cities even before the formation of the Delian League. The confederacy of Delos was formed in 478 B.C. In the later Greek leagues some central judicial authority was established to enforce federal control. This was not done in the Delian League; there was no supreme court. When members of the league refused to pay assessments, the Athenian admirals, responsible for the conduct of the military operations of the league and the collection of contingents, put pressure upon delinquent communities by prosecuting and punishing them (*δίκαις ὑπάγοντες καὶ κολάζοντες*).<sup>2</sup> It is to be assumed that the individuals, whether magistrates or political agitators, who were responsible for inciting a community to withhold its contributions were haled before Athenian courts. No others were available for the purpose. The Delian League gradually developed into an Athenian empire over tributary states. The change came about in two ways. The smaller communities, growing weary of military service when the Persian menace was no longer imminent, commuted it for money payments and became tributaries. This change in status, though voluntary, must have involved restriction of the jurisdiction of local courts. In Greek theory and practice political sovereignty involved control of the judiciary. Some of the larger states, trusting to their military power, attempted to secede from the league. These attempts were promptly checked by Athens. In the acts of settlement defining the future relations between Athens and these conquered states, the jurisdiction of the local courts was always very materially restricted. They were not permitted to inflict the penalties of

<sup>1</sup> Cf. Robertson, *op. cit.*, pp. 9 ff., and Lipsius, *op. cit.*, pp. 965 ff.

<sup>2</sup> Plutarch *Cimon*, xi. Cf. Robertson, *op. cit.*, pp. 27 f.

death, exile, or disfranchisement.<sup>1</sup> All such cases were tried in Athens. The date at which Athens began to restrict the jurisdiction of the local courts of the overseas communities and make her own tribunals imperial courts cannot be fixed with any degree of certainty. Thasos revolted in 470-469, but it was certainly not the first ally to find its league obligations irksome. Coercion of delinquents must have begun early in the history of the league. When Cimon became prominent in the military undertakings of the league, he ceased coercing the delinquents and permitted any community that desired it to substitute money payments for personal service in the forces of the league.<sup>2</sup> Now Cimon was in charge of the forces that recovered Sestos and drove Pausanias from Byzantium in 476, and after the ostracism of Themistocles in 471 it was he who dictated Athenian military policy.<sup>3</sup> There is little doubt that cases originating outside of Attica began to find their way into Athenian courts in appreciable numbers several years before the revolt of Thasos in 470. The normal litigation of a growing and prosperous city augmented by *δίκαι ἀπὸ συμβόλων* and cases originating in the recalcitrant or subordinate cities of the league could not have been handled by the primitive system of magisterial trials and appeals to the assembled citizens. Nor would the substitution of the Heliaea for the magistrates, as the court of first resort, have sufficed. No single body could have coped with so much litigation. The dicasteries alone could have handled it.

Whether the institution of the dicasteries was due to an increasing frequency of appeal from magisterial judgments or to a demand from the people for more participation in the administration of justice, as seems more likely, the change in the method of electing magistrates<sup>4</sup> in 487-486 is not likely to have been far removed in time from a measure restricting

<sup>1</sup> For an excellent example of these acts of settlement, see Dittenberger, *Sylloge*, No. 27; Hicks and Hill, *op. cit.*, No. 40 (ll. 71-76).

<sup>2</sup> Plutarch *Cimon*, x.

<sup>3</sup> Busolt, *op. cit.*, Vol. III, i, p. xvi, and p. 113 n.

<sup>4</sup> Aristotle, *op. cit.*, xxii. 5.



and changing the judicial functions of the magistrates, if indeed the two matters were not dealt with in the same measure.<sup>1</sup> Those who argue that the constantly increasing frequency of appeals destroyed the prestige of the magistrates attach too much importance to their judicial functions. It is quite as likely that the increasing power of the *boulé* as the executive and administrative instrument of the sovereign assembly weakened the administrative powers of the chief magistrates and reduced their prestige. In any event, the tendency of Greek democracy was to concentrate all power in the hands of the assembly.<sup>2</sup> Magistrates elected by reason of their personal abilities or their political strength were a hindrance to the realization of the democratic ideal. Democracy refused to delegate authority. Whether the adjustment of the magistracies to the new democracy was effected by a single comprehensive measure or a series of laws makes little difference. The change in their judicial functions must have been effected in or near the year 487-486 B.C.

When the *Heliaea* ceased to be a court of appeal and became a court of first resort for all cases except homicide trials and some involving impiety, obviously the whole body could not sit in judgment on each case. The difficulty was met by drawing sections called *dicasteries* (*δικαστήρια*) from the *Heliaea*. In this way the burden of public service, as yet unpaid, was distributed and several cases could be tried at once. Instead of holding all members of the *Heliaea* liable for service, they selected annually 6,000 *dicasts*. Doubts as to the correctness of this number have been expressed. It has been argued that *dicasts* in such large numbers were neither necessary nor available until the middle of the fifth century.<sup>3</sup> The number 6,000 is attested for the fifth century by three important sources.<sup>4</sup> Bdelycleon in the *Wasps*<sup>5</sup> of

<sup>1</sup> For the importance of the archons up to 488-487 B.C., cf. Rosenberg, "Parstellung des Themistokles," *Hermes*, LIII, 314 f. Cf. Ehrenberg, "Kleisthenes und das Archontat," *Klio*, XIX, 110: "Die Namen der Archonten zwischen Kleisthenes und dem Jahre des Telesinos (487-6) beweisen durch das Vorkommen der leitenden Politiker die Bedeutung, die dem Amt noch innewohnte."

<sup>2</sup> Headlam, *Election by Lot*, p. 26 ff.

<sup>3</sup> S. B. Smith, *TAPA*, LVI, 109.

<sup>4</sup> Cf. Fränkel, *op. cit.*, p. 13; Lipsius, *op. cit.*, p. 135.

<sup>5</sup> Line 662. Cf. Starkie, *The Wasps of Aristophanes*, Excursus VI, p. 399.

Aristophanes reckons the number at 6,000, adding *κούπω πλείους ἐν τῇ χώρᾳ κατένασθεν*. To infer from these words that "the number was not a fixed one," is to miss the cynical humor of the line. The implication is that "no one can tell what the future may bring, but thus far we have never had more than 6,000 of these henchmen of the demagogues." Rogers' version brings this out clearly. "Six thousand justices, count them through, there dwell no more in the land as yet."

There is evidence for a full quota of 6,000 dicasts in 415 B.C. during the inquiry into the mutilation of the Hermae.<sup>1</sup> It was a period of intense popular excitement. A motion was brought in to turn over Leogoras, the father of Andocides, and others to a court for trial. Leogoras raised a constitutional and technical objection to the motion by means of a *γραφὴ παρανόμων*. Ordinarily a *γραφὴ παρανόμων* did not attract much attention. But the average Athenian, with all his familiarity with litigation, resented the interposition of technicalities that seemed designed to balk the popular will. It was the practice to have important cases tried by a dicastery made up of several sections. In democratic theory a large jury was a safeguard;<sup>2</sup> it could be neither bribed nor browbeaten. The precaution of having a panel of 6,000 dicasts pass on the objections of Leogoras indicates that the people wanted assurance that the popular will would not be thwarted. Another significant bit of testimony in favor of the number 6,000 is the practice of calling the dicasts "The Six Thousand"<sup>3</sup> (*οἱ ἑξακισχίλιοι*). The evidence of these passages was confirmed, if confirmation was necessary, by Aristotle in the *Constitution of Athens*.<sup>4</sup> But, quite apart from these definite statements in the literature, there are such cogent reasons for believing that the total number of dicasts was 6,000 that this conclusion would have been justified even without these statements.

<sup>1</sup> Andocides i. 17.

<sup>2</sup> Cf. Grote, *op. cit.*, V, 237 ff.

<sup>3</sup> Scholiast on Plato *Laws*, xii. *πρυτανεία, ἀργύριόν τι, δ κατατίθεται ὑπὸ τῶν δικαζομένων, καὶ δίδοται δικαστικὸν τοῖς ἑξακισχίλοις*. Cf. Suidas, s.v. *πρυτανεία*. Cited by Rogers, *Introduction to the Wasps*, p. xxi.

<sup>4</sup> *Ath. Pol.* xxiv. 3: *δικασταὶ μὲν γὰρ ἦσαν ἑξακισχίλιοι*.

Although they sat in sections, they were annually drafted and sworn in as a body. Their fitness for office was not tested by any *δοκιμασία*; nor were they held accountable for their acts at a *εἵθυνα*.<sup>1</sup> The dicasts were not the servants of the people; they were the people. This is what is meant by the author of a treatise on the constitution of the Athenians<sup>2</sup> when he says that the allies had to bring their cases before a "court which is none other than the Athenian people." And so the dicasts are addressed by orators as *ὦ ἄνδρες Ἀθηναῖοι*.<sup>3</sup> To them are attributed the acts and measures of the ecclesia. They represent the people in their judicial capacity; they are *δῆμος πληθύνων*.<sup>4</sup> Hence they must number 6,000.

The 6,000 dicasts were divided into sections. By a curious and convenient legal fiction the representative character of the 6,000 dicasts was extended to these commissions. Each panel was a miniature Heliaea, sovereign in its sphere. Its verdicts were final; they were not subject to review or appeal. For the practice of dividing the jurors into panels there was ample precedent in the current practice of manning the minor homicide courts with 51 *ἐφέται* drawn from the Areopagus.<sup>5</sup> In one respect the 6,000 dicasts differ from 6,000 ecclesiasts selected at random. The dicast had to be at least thirty years of age. The precedent may be the requirement that members of the *boulé* had to be at least thirty years old. Similarly the size of the section, normally 500, was the same as that of the *boulé*, which also was really a commission of the ecclesia. It lacked, however, the independent irresponsible judicial powers possessed by the dicasteries.

The date at which pay for dicasts was introduced is nowhere specifically set down in the sources. Plutarch says

<sup>1</sup> Aristophanes *Wasps*, 587.

*καὶ ταῦτ' ἀνυπεύθυνοι δρῶμεν τῶν δ' ἄλλων οὐδεμί' ἀρχή.*

<sup>2</sup> (Xenophon) *Ath. Pol.* i. 18.

<sup>3</sup> Cf. τὸ ὑμέτερον πλῆθος and τὸ ὑμέτερον κοινόν in forensic speeches, e.g., Plato *Apology*, 31 C.; Lysias xii. 42. 87.

<sup>4</sup> Cf. *supra*, p. 202. Lofberg, *Sycophancy in Athens*, pp. 10 f.

<sup>5</sup> Cf. *supra*, pp. 99 ff.

that Pericles in his struggle with Cimon, finding it impossible to compete with his munificence, followed the advice of Damonides and "had recourse to the distribution of the people's own wealth. . . . And soon what with festival grants and jurors' fees and other fees and largesses he bribed the multitude by the wholesale and used them in opposition to the Areopagus."<sup>1</sup> Plutarch quotes Aristotle as his authority for this statement regarding the advice of Damonides. It is certain, then, that Plutarch was familiar with what Aristotle has to say about pay for jurors. Now Plutarch definitely fixes the date prior to the attack on the Areopagus. Presumably he believed that he was following Aristotle in the matter of the date.

Although the credit for introducing jury pay belongs to Pericles, the idea was first suggested by Aristides.<sup>2</sup> As the Jack Tars, ναυτικός ὄχλος, of Athens gained the battle of Salamis, the founding of the empire was really a democratic achievement.<sup>3</sup> The moving spirit in its organization was Aristides. Realizing the importance of securing democratic support for the new imperialistic policy by having them share in the profits, he "advised the people to lay hold of the leadership of the league and to quit the country districts and settle in the city." He pointed out that all would be able to make a living there, some by service in the army, others in the garrisons, others by taking part in public affairs;<sup>4</sup> and in this way they would secure the leadership. This advice was taken; "and when the people had assumed the supreme control, they proceeded to treat their allies in a more imperious fashion with the exception of the Chians, Lesbians, and Samians." Now, one of the chief means of control of the subordinate cities was through the administration of justice. Pseudo-Xenophon, writing in 424, justifies the Athenian judicial restrictions by explaining that, owing to the requirement

<sup>1</sup> Plutarch *Pericles*, ix. Aristotle *Ath. Pol.* xxvii. 3.

<sup>2</sup> Aristotle *Ath. Pol.*, xxiv.

<sup>3</sup> Cf. *CAH*, V, III.

<sup>4</sup> The *δικασταί* would naturally be reckoned among τοῖς τὰ κοινὰ πράττουσι (Aristotle, *op. cit.*, xxiv). Aristides doubtless had this group in mind and was really the one who originated the idea of a paid judiciary.

that the allies come to Athens ἐπὶ δίκας, "the Athenians sitting at home manage the allied cities. They are able to save their friends and destroy their enemies in their courts [ἐν τοῖς δικαστηρίοις]."<sup>1</sup> The advice of Aristideides was tendered sometime between the foundation of the league in 487 B.C. and his death in 467 B.C.<sup>2</sup> Aristotle intimates that the Athenians were not slow to follow it. The immediate effect was a stricter control of the allied and subordinate states. The reference to Chios, Lesbos, and Samos as the only free allies fixes the date after 463 B.C., when Thasos was reduced.<sup>3</sup> Among the beneficiaries of the plan of Aristideides, Aristotle includes 6,000 paid jurymen. According to this passage, jury pay was introduced not much later than 463 B.C. In a passage in the *Politics*<sup>4</sup> Aristotle attributes the restriction of the power of the Areopagus to Ephialtes and Pericles, and the introduction of jury pay to Pericles. Aristotle is summarizing here and does not separate the attacks as he does in the *Politeia*,<sup>5</sup> where he makes Themistocles and Ephialtes responsible for an attack in 462-461 B.C. and Pericles responsible for the final attack in 451-450 B.C. In both accounts the introduction of jury pay follows the restriction of the powers of the Areopagus. But the order is not necessarily chronological. In fact, in the *Politeia* he defers the mention of a paid jury until after the account of the outbreak of the Peloponnesian War in 432-431 B.C. Here the order of narration cannot possibly be chronological. Pericles<sup>6</sup> first came into prominence by his prosecution of Cimon for accepting a bribe during the campaign against Thasos in 464-463 B.C. He could scarcely have carried the measure regarding jury pay much before this date. A paid judiciary was subjected to

<sup>1</sup> (Xenophon) *Ath. Pol.* i. 16.

<sup>2</sup> Busolt, *op. cit.*, Vol. III, i, p. 112 n. 2.

<sup>3</sup> *Ibid.*, Vol. III, i, xix.

<sup>4</sup> 1274a, 7: καὶ τὴν μὲν ἐν Ἀρείῳ πάγῳ βουλὴν Ἐφιάλτης ἐκόλουσε καὶ Περικλῆς, τὰ δὲ δικαστήρια μισθοφόρα κατέστησε Περικλῆς.

<sup>5</sup> xxv and xxvii. The dates given are those of Thalheim in his edition of the *Ath. Pol.*

<sup>6</sup> Bury, *op. cit.*, p. 343; Busolt, *op. cit.*, Vol. III, i, p. 254; Aristotle *Ath. Pol.* xxvii. 1. Pericles is described in Plutarch *Pericles*, x, as εἰς τῶν κατηγορῶν . . . ὑπὸ τοῦ δήμου προβεβλημένος. Cf. Sandys' notes on *Ath. Pol.* xxvii. 1.

considerable criticism afterward.<sup>1</sup> It may be assumed that the proposal aroused some opposition at the time. Only a man of some prominence could successfully sponsor such a radical, though natural, measure. Now, if Pericles resorted to this method of winning popular favor to help him in his contest with Cimon, one would expect the measure to have been carried before 461 B.C., when Cimon was ostracized.

Plutarch<sup>2</sup> puts jury pay before the attack on the Areopagus, without specifying whether it was the first attack in 462-461 B.C. or the second attack in 451-450 B.C. As has been pointed out, a number of men were concerned in the attack, at first under the leadership of Ephialtes and later under Pericles. Naturally Pericles would be one of the followers of Ephialtes. Aristotle's silence on this point has no significance. These considerations would warrant us in putting the date as early as 463-462 B.C.<sup>3</sup>

There are, however, fairly good reasons for putting the date as late as 451 during the brief period of Cimon's return from exile and just before Pericles' attack on the Areopagus. In 453-452 the rural justices were reappointed.<sup>4</sup> They now numbered 30. The number 30 corresponds to the number of the trittyes which served as a link between the demes and the tribes. Nothing is known in detail about these circuit judges except what may be inferred from their predecessors under Peisistratus, and their successors, the Forty. It may be assumed with confidence that their jurisdiction was civil rather than criminal, and that they settled a number of cases that would otherwise have come before the heliastic courts. One can well imagine that the courts were heavily burdened even before the reforms of Ephialtes enlarged their jurisdiction. The institution of the rural justices would afford a measure of relief. But one wonders if the people who relied

<sup>1</sup> Aristotle *Ath. Pol.* xxvii. 4: ἀφ' ὧν αἰτιῶνται τινες χεῖρω γενέσθαι [sc. δικαστήρια], κληρουμένων ἐπιμελῶς δὲ <μᾶλλον> τῶν τυχόντων, ἢ τῶν ἐπιεικῶν ἀνθρώπων. Cf. Plato *Gorgias*, 515 E.

<sup>2</sup> *Pericles*, ix.

<sup>3</sup> Busolt (*op. cit.*, III, 1. 263) puts pay before the earliest attack on the Areopagus (462-461), in which both Ephialtes and Pericles participated.

<sup>4</sup> Aristotle *Ath. Pol.* xxvi. 3.

on state pay for some or all of their support would view in such a dispassionate fashion a measure that reduced their opportunities for profitable employment. If, however, the dicasts were still unpaid, the situation would be quite altered. Unpaid jury service could not be particularly attractive. There would be no popular objection to any measure of relief. This conception of the situation favors the later date. But the balance of probabilities is in favor of the earlier date. If Pericles was prominent enough in 462 to engage in the prosecution of Cimon, he must have participated in the first and most formidable attack on the Areopagus; and he would not have neglected so effective a means of advancing democracy as pay for jurors and others.<sup>1</sup>

The 6,000 citizens who were to represent the people judicially were chosen annually by lot from among those who were qualified. Speaking of his own day, Aristotle says: "All persons above thirty years of age are qualified to serve as jurors, providing they are not debtors to the state and have not lost their civil rights."<sup>2</sup> This qualification goes back at least as far as the fifth century. An inscription furnishes evidence that the jurors were listed by tribes in the official register.<sup>3</sup> This justifies the inference that 600 were drawn from each tribe. It has been rightly concluded that the jurors, like the senators, were apportioned among the demes in each tribe, in accordance with their number and population,<sup>4</sup> on the basis of the deme registers (ληξιαρχικὰ γραμματεῖα).

Little is known about the method of selection in the fifth century. Aristotle, in discussing the institution of pay for

<sup>1</sup> Cf. Busolt-Swoboda, *op. cit.*, p. 897, on the necessity of the step in the interest of democracy.

<sup>2</sup> *Ath. Pol.* lxiii. 3.

<sup>3</sup> *CIA* iv. 1. 35b: Ἱεροποι[ς δ]ὲ οἵτινες Ἱεροποιέουσ[ι τὴν θυσίαν, δέκα ἄνδρας δια]κλε[ροῦσαι] ἐκ τῶν δ[ικα]στῶν ἕνα ἐκ τῆς φυλῆς ἐκ τοῦ [πινάκος κ.τ.λ. Schoell, *Sitzungsberichte der Bayerischen Akademie* (1887), p. 6, first drew attention to the evidence of the inscription. Cf. Teusch, *De sortitione apud Athenienses*, p. 59, and Thalheim in *Pauly-Wissowa*, V, 566, s.v. δικασταί. The jury tickets (πινάκια) thus far discovered belong to the fourth century. Cf. *infra*, p. 368. Each juror must have had some sort of identification card. Hommel, "Heliaca," *Philologus*, XIX, Supplementband, Heft 11, p. 110, n. 275.

<sup>4</sup> Wilamowitz, *Aristoteles und Athen*, I, 201. Cf. Teusch, *op. cit.*, p. 60.

jurors, comments on its effects by referring to adverse criticisms of Pericles' measure. "Some persons accuse him of thereby causing a deterioration in the character of the juries, since it was always the inferior people who were anxious to submit themselves for selection as jurors, rather than the men of better position."<sup>1</sup> On the basis of this statement it is accepted that the jurors were selected from volunteers.<sup>2</sup> The military commitments<sup>3</sup> of Athens as mistress of the Delian League and the constantly increasing press of litigation made it well-nigh impossible for the same man to be both juror and soldier. In the fifth-century judicial system each juror was assigned to a specific court for a year.<sup>4</sup> When an army was mobilized, men would be withdrawn from practically every court in larger or smaller numbers because they were mobilized by classes.<sup>5</sup> The easiest way to deal with the situation would have been to exempt jurors from military service. It is known that senators and other civil officials, and even merchants,<sup>6</sup> were excused under certain circumstances. But there is no evidence that jurors were so exempted.

Aristophanes constantly conveys the impression that the jurors were all old men, boastful of their deeds in ancient sieges and battles. Modern students, realizing that few men, for example, engaged in the siege of Byzantium<sup>7</sup> in 478 B.C. would be fit for any public service in 422 B.C., are inclined to discount all the comedian's statements regarding the age of the jurors as intended to discredit them. There is evidence

<sup>1</sup> Aristotle *Ath. Pol.* xxvii. 4.

<sup>2</sup> Gilbert, *op. cit.*, p. 391, n. 4; cf. Teusch, *op. cit.*, p. 60.

<sup>3</sup> In the year 459-458 B.C. the casualties of one tribe, amounting to 176, were suffered in six battles on two fronts. *CIA* i. 433. Dittenberger, *op. cit.*, No. 9; Hicks and Hill, *op. cit.*, No. 26.

<sup>4</sup> Cf. *infra*, p. 235.

<sup>5</sup> Gilbert, *op. cit.*, pp. 315 ff.

<sup>6</sup> *Ibid.*, p. 318, n. 1. Senators and tax-farmers are mentioned in the sources as being exempt. It is assumed that magistrates were exempt, otherwise court sessions would have had to be suspended.

<sup>7</sup> Aristophanes *Wasps*, 235-39. Cf. Grote, *op. cit.*, V, 406. Cf. *Wasps*, 354, for reference to siege of Naxos, 476 B.C., in which members of the chorus had been engaged. For other references to aged jurors, cf. *Wasps*, 219-20. They sing old songs, μέλη ἀρχαῖα. The chorus who are Philocleon's chums (ἄνδρες ἡλικες) call him γέρον. Cf. ll. 224, 441, 540. Others in Lipsius, *op. cit.*, p. 164, n. 99.



that younger men did serve on the juries of the fifth century. A client of Antiphon<sup>1</sup> refers explicitly to the younger men on the jury. Even Aristophanes himself has been cited as a witness that jurors were not always elderly men. Strepsiades first served as a juror when his son Pheidippides was six years old.<sup>2</sup> And others in the *Wasps*<sup>3</sup> are represented as having young children. But after all, it is obvious that, according to Aristophanes, a preponderance of the jurors were elderly men, beyond the age for military service.

Military considerations were not overlooked in the provisions made for the administration of justice. This appears in the appointment of arbitrators when public arbitration was introduced. Every man in his sixtieth year was listed as an arbitrator for a year.<sup>4</sup> This evident desire not to withdraw effectives from military service to fill the new judicial offices warrants the belief that in selecting jurors precautions were taken not to reduce the number of effectives for military service more than was absolutely necessary. This could be done by accepting at once all men over sixty who volunteered. If these were not sufficient, the required total (6,000) could be made up by selections from the younger men who offered for jury service. If there was, in fact, as Aristophanes intimates, a marked preponderance of elderly men on the jury, it is thus most readily explained. It does not seem possible that allotment from the whole group would produce

<sup>1</sup> v. 71: ταῦθ' ὑμῶν αὐτῶν ἐγὼ οἶμαι μεμνηῖσθαι τοὺς πρεσβυτέρους, τοὺς δὲ νεωτέρους πυνθάνεσθαι ὥσπερ ἐμέ.

<sup>2</sup> Aristophanes *Clouds*, 863-64.

δν πρῶτον ὀβολὸν ἔλαβον ἡλιαστικόν,  
τούτου 'πριάμην σοι Διασίοις ἀμαξίδα.

<sup>3</sup> Lines 248 ff. and 291 ff. But the ages of children are not trustworthy evidence as to the ages of fathers. One gets the impression that Strepsiades was no longer young when he was married. Bruck, "Über die Organisation der athenischen Heliaztengerichte im 4. Jahrh. v. Chr.," *Philologus*, (LII), 312, cites several passages in the orators in which young jurors are mentioned (Isaeus vii. 13; Demosthenes xix. 280; Demosthenes lix. 30). But the conditions of jury service in the fourth century are quite different from those of the fifth.

<sup>4</sup> Aristotle *Ath. Pol.* liii. 4. Service as arbitrator was substituted for the last year of military service. As a rule men between fifty and sixty years were not employed outside of Attica. Cf. Gilbert, *op. cit.*, p. 316.

so high a percentage of old men, even if they had more leisure and inclination for jury service than the younger men, and volunteered in larger numbers.

There is no reference to suspension of court sessions in Aristophanes. On the contrary, Bdelycleon, in the *Wasps*, makes an estimate of the earnings of the dicasts on the basis of employment for all for 300 days per year. This is an exaggeration, but the implication that the courts were constantly busy is borne out by Pseudo-Xenophon, who, in discussing the congestion of public business, including litigation, says, "Even now when the courts sit throughout the year, they do not suffice to suppress crime, because of the size of the population."<sup>1</sup>

There is no mention of a *dokimasia* of jurors to establish their qualifications for office. In Aristotle's day at least the responsibility for being properly qualified was laid upon the juror. "If any unqualified person serves as a juror, an information is laid against him and he is brought before a court; and if he is convicted, the jurors assess the punishment or fine which they consider him to deserve."<sup>2</sup> This procedure seems to suit the period when everybody who offered was accepted at his own risk, rather than the fifth century, when they were selected by lot from volunteers. The officials must have assured themselves that those selected were properly qualified. The age qualification could be easily established by referring to the military lists under the names of the *archons eponymi*. This practice was followed in the case of the public arbitrators.<sup>3</sup> *Ἀριμία* was also a matter of record.

The jurors regularly were divided into panels. Only one case is recorded in which the 6,000 sat as a body.<sup>4</sup> As the circumstances were very unusual, it may be concluded that a panel of 6,000 was very rarely assembled. The panels normally contained 500. On the basis of fourth-century practice it is assumed that there were ten sections of 500 (501)

<sup>1</sup> Aristophanes, *Wasps* 661 ff.; Pseudo-Xenophon, *Ath. Pol.* iii. 6.

<sup>2</sup> Aristotle *Ath. Pol.* lxiii. 3.

<sup>3</sup> Bruck, *op. cit.*, p. 297.

<sup>4</sup> Andocides i. 17.

and 1,000 supernumeraries.<sup>1</sup> These sections, containing jurors from different tribes and demes, reflected current public opinion. There is uncertainty regarding the number of courts in the fifth century. Lipsius<sup>2</sup> does not commit himself on the subject. "Die Zahl der Gerichtshöfe vermögen wir nicht zu bestimmen, da Aristoteles auch für seine Zeit keine Angabe macht. Wenn die Grammatiker von zehn Gerichtshöfen reden, so beruht das auf einer Verwechslung mit der Richterabteilung." Busolt<sup>3</sup> seems to favor the view that there were ten courts in the fifth century. Five courts are mentioned in fifth-century sources, besides the *Heliaea*, i.e., the court of the *thesmothetae*. They are the *παράβυστον*, the court of the Eleven;<sup>4</sup> the *καινόν*;<sup>5</sup> the *ᾠδεῖον*; the court *πρὸς τοῖς τειχίοις*; and the court of the archon.<sup>6</sup> To these should be added the three minor homicide courts, at the Delphinium, the Palladium, and in Phreatto, after they were manned by dicasts in place of ephetae in the middle of the fifth century.<sup>7</sup> This gives a total of six courts, exclusive of the three minor homicide courts. The same courthouse may have been used by more than one tribunal.

The panels for service were selected annually and remained intact for the year.<sup>8</sup> In the *Wasps* of Aristophanes,

<sup>1</sup> Lipsius, *op. cit.*, p. 136.

<sup>2</sup> *Op. cit.*, p. 168.

<sup>3</sup> Busolt-Swoboda, *Staatskunde*, p. 1154. Cf. Hommel, *op. cit.*, p. 111, n. 281.

<sup>4</sup> Harpocration, *s.v.* *παράβυστον*. οὕτως ἐκαλεῖτό τι τῶν παρ' Ἀθηναίοις δικαστηρίων ἐν ᾧ ἑδικάζον οἱ ἑα. Antiphon *Frag.*, 42. Cf. Aristophanes *Wasps*, 1108-9:

οἱ μὲν ἡμῶν οὐ περ ἀρχῶν, οἱ δὲ παρὰ τοὺς ἑνδεκα,  
οἱ δ' ἐν ᾠδεῖῳ δικάζουσ', οἱ δὲ πρὸς τοῖς τειχίοις.

<sup>5</sup> τὸ *καινόν*. Aristophanes, *Wasps*, 120-21:

ὁ δ' αὐτῷ τυμπάνῳ  
ἕξας ἑδικάζεν ἐς τὸ Καινόν ἐμπροσάν.

<sup>6</sup> Nothing is known about the presiding officials. The *ᾠδεῖον* may be the court of the *εἰσαγωγεῖς*. Cf. Lipsius, *op. cit.*, p. 137, n. 11. The court *παρὰ τοῖς τειχίοις* is not otherwise known.

<sup>7</sup> Cf. *infra*, p. 270.

<sup>8</sup> Aristophanes *Wasps*, 400.

οὐ ξυλλήγεσθ' ὁπόσοισι δίκαι τῆτες μέλλουσιν ἔσεσθαι.

Philocleon calls to his rescue all who are interested in lawsuits for the current year. Beyond that, there was no assurance that he would be active as a juror.

Philocleon and the old dicasts who, in the guise of wasps, constitute the chorus are members of the same court for the year. They are fellow-dicasts (*συνδικασταί*) who, day after day, go to the same court. They refer explicitly to the acquittal of the defendant the day before in a court in which they and Philocleon sat as jurors.<sup>1</sup> And they were all under orders to appear that day to try Laches, who is represented as having acquired much wealth by his speculations.<sup>2</sup> The various references to the activities of the jurors in the *Wasps* are not intended to be entirely consistent, but they suggest criminal cases and the court of the thesmothetae. A passage in Antiphon<sup>3</sup> shows very clearly that the same panel sat in this court day after day. The *choregus*, a client of Antiphon on trial for the death of a chorus boy, tells the jury that Philocrates, one of his accusers, appeared in the court of the thesmothetae and announced that the *choregus* was responsible for the death of his brother while in training for a chorus. The *choregus* answered the charge both at once and on the following day before the same jurors. The proceeding was entirely informal. The purpose of the maneuver was to prevent the *choregus*, as a polluted person, from appearing before these jurors the next day to prosecute some wrongdoers. These defendants had induced Philocrates to bring a charge of homicide against the *choregus* to disqualify him.

Whatever the number of courts in the fifth century may have been, it is generally believed that there were ten sections of 500 each and 1,000 supernumeraries who constituted a reserve to fill vacancies in individual courts, resulting from death, illness, or other unavoidable causes, or to expand the number of jurors to 1,000 or 1,500 for important cases. This purpose was accomplished by assigning to each court 600.<sup>4</sup> Now this in itself seems at first sight not to be an unreasonable procedure. But the manner in which it is supposed to have been worked at once arouses grave suspicions. Each day the entire panel of 600, minus absentees, started out for

<sup>1</sup> Aristophanes *Wasps*, 281-84.

<sup>2</sup> vi. 21-23. Cf. Lipsius, *op. cit.*, p. 138.

<sup>3</sup> *Ibid.*, 240.

<sup>4</sup> Lipsius, *op. cit.*, pp. 136 ff.

a court session some time before daybreak. As soon as 500 were admitted, the doors were closed, and several score, if not a hundred, men were excluded.<sup>1</sup> The sole evidence for this procedure is drawn from the *Wasps* of Aristophanes. The old dicasts of the chorus appear each day long before daylight to summon Philocleon; they urge haste to arrive at the court "ere morning break,"<sup>2</sup> for whoever arrives after the signal for opening the court will not get his 3 obols.<sup>3</sup> And in the domestic court which tries the dog, Philocleon is pleased with the assurance that "though you sleep till mid-day, no archon here will close the door against you."<sup>4</sup> But these things are quite easily explained without assuming that the chorus is a section of the 600 jurors converging in rivalry from various directions upon a court which requires only 500.

The haste of the chorus to arrive before daybreak is due to the fact that the court, like the ecclesia, opened early, and they had been ordered to be on hand in good time.<sup>5</sup> The humor of the situation lies in the fact that they are unnecessarily and absurdly early. This is made quite evident by the conversation between Bdelycleon and one of the slaves who is helping to keep the old dicast interned.<sup>6</sup>

BDELYCLEON: His fellow justices will come this way calling him up.

SLAVE: Why sir, 'tis twilight yet.

BDELYCLEON: Why then, by Zeus, they are very late today. Soon after midnight is their usual time to come here carrying lights.

Each member of the chorus is a replica of Philocleon, who wants to be around the court night and day and even to be

<sup>1</sup> Teusch, *op. cit.*, pp. 62-63.

<sup>2</sup> *Wasps*, 245:

σπεύδωμεν, ὠνδρες ἡλικες, πρὶν ἡμέραν γενέσθαι.

<sup>3</sup> *Ibid.*, 688-90:

ἦκειν εἴπη πρῶ κὰν ὥρα δικάσονθ' ὡς ὅστις ἂν ὑμῶν  
ὕστερος ἔλθῃ τοῦ σημείου, τὸ τριώβολον οὐ κομίζεται.

<sup>4</sup> *Ibid.*, 774-75:

κὰν ἔγρη μεσημβρινός,  
οὐδεὶς σ' ἀποκλείσει θεσμοθέτης τῇ κυγκλίδι.

<sup>5</sup> *Ibid.*, 242-43:

χθὲς οὖν Κλέων ὁ κηδεμὼν ἡμῖν ἐφέϊτ' ἐν ὥρᾳ  
ἦκειν ἔχοντας ἡμερῶν ὀργὴν τριῶν ποιηράν.

<sup>6</sup> *Ibid.*, 214 ff.

buried there. One of the slaves on guard before the house explains the situation as follows:

I'll tell you the disease old master has.  
He is a lawcourt-lover, no man like him.  
Judging is what he dotes on . . . .  
At night he gets no sleep, no, not one grain,  
Or if he doze the tiniest speck, his soul  
Flutters in dreams around the water clock.

Supper scarce done he clamours for his shoes,  
Hurries ere daybreak to the court, and sleeps  
Stuck like a limpet to the door post there.<sup>1</sup>

If the rooster failed to wake him in time, he said that it had been bribed by defendants.<sup>2</sup> And he begged that, if anything happened to him in his attempt to escape, he be buried under the bar.<sup>3</sup>

The order for the appearance of the jurors under pain of not receiving pay if they arrived "after the signal" contains no hint that it was a case of "first come first served."<sup>4</sup> On the contrary, the plain implication of the passage is that all would be admitted if they arrived on time. In the trial of the dog which reproduces the procedure of a regular trial, Bdelycleon, acting as the herald, makes proclamation:

Is any Justice out there? Let him enter.

We shan't admit him when once they have begun.<sup>5</sup>

The loiterer is to be excluded, not because the panel is full, but because the proceedings have begun. The point that Bdelycleon is making is that, while the jurors must be on time, else they lose their fees, the advocate in league with Cleon,

<sup>1</sup> *Ibid.*, 87-93, 103-5.

<sup>2</sup> *Ibid.*, 100-103:

τὸν ἀλεκτρούνα δ', ὅς ῥ' ἀφ' ἑσπέρας, ἔφη  
δψ' ἐξεγείρειν αὐτὸν ἀναπείσμενον,  
παρὰ τῶν ὑπευθύνων ἔχοντα χρήματα.

<sup>3</sup> *Ibid.*, 385-86:

δράσω τοίνυν ὑμῖν πίσυρος· καὶ μανθάνει· ἦν τι πάθω 'γώ,  
ἀνελόντες καὶ κατακλαύσαντες θείναι μ' ὑπὸ τοῖσι δρυφάκτοις.

<sup>4</sup> *Ibid.*, 689-90.

<sup>5</sup> *Ibid.*, 891-92:

εἴ τις θύρασις ἡλιαστής εἰσίστω  
ὥς ἡνίκ' ἀν' λέγωσι, οὐκ ἐσφρήσομεν.

their master, comes late if he chooses, and still gets his pay.<sup>1</sup> The proceedings are delayed to suit his convenience. Meanwhile the jurors, like Dicaeopolis in the *Acharnians*, sit and wait, possessing their souls in patience if they can. This is part of their slavery.

There is another aspect of the situation that deserves attention in this connection. If there was a race of 600 men for places for only 500, it is strange that the chorus should tarry for a rival in the competition for seats and even fight for his release that he might accompany them. Men who were rivals for a seat in court, or a place in line awaiting the opening of court, would be more likely to hasten along quietly and alone. Their singing could only waken more dicasts, whose houses they passed, and add to the number of competitors. When the jurors arrive in the neighborhood of the court, there is no indication that they stood in line for hours waiting for the court to open. Instead, we find the old dicast talking leisurely and with immense satisfaction to defendants who flatter and wheedle him to win his favor.<sup>2</sup> Neither Philocleon nor any of his fellow-dicasts exhibit any fear that others may arrive before them and deprive them of their pay. Their sole concern is the possibility that there may be no court session that day.<sup>3</sup> Philocleon's desire for a front seat is not strange; he wants to be sure that he will not miss any of the proceedings. He wants to be the first to come and the last to leave.<sup>4</sup>

If candidates for jury service had to assemble long before daylight and stand in line to secure a place long before the hour for beginning proceedings, it is inconceivable that Bdelycleon should have failed to make a point of the obvious

<sup>1</sup> *Ibid.*, 686 ff.

<sup>2</sup> *Ibid.*, 551 ff. Philocleon is represented as going to court and sleeping "stuck like a limpet to the doorpost." This does not mean that he wants to get first place in the line. It simply means that he is so "court-crazy" (*φιληλιαστής*) that he wants to sleep half of the night at the courthouse door (ll. 104-5).

<sup>3</sup> *Ibid.*, 302-5.

<sup>4</sup> *Ibid.*, 89-90, 754-55.

κάπιςταλιν ἐπὶ τοῖς κημοῖς  
ψηφισμένων ὁ τελευταῖος.

unfairness of such a method of deciding between claimants for a seat.<sup>1</sup> He could have cited no better evidence of their slavery. The natural solution of such a difficulty in Athens would have been the use of the lot. But there is no indication in the *Wasps* or elsewhere that the lot was employed in this connection.<sup>2</sup>

The requirement of courts of 1,000 and more introduces a complication into the allotment of panels. These larger courts are commonly said to consist of two or three δικαστήρια.<sup>3</sup> If there were ten courts served by 600 jurors each, the constitution of a larger court would involve the withdrawal of panels from service in other courts. This difficulty has been observed, and the suggestion has been made that there may have been only five courts (*Gerichtshöfe*) in each of which two panels served alternately.<sup>4</sup> In this way five panels would always be available for service in the larger tribunals.

The theory that there were 100 supernumeraries for each panel is based upon the assumption that the full panel of 500 (501) must be present at each session of the court. This is a plausible assumption, but there are difficulties. It was an ancient rule of law that an even vote was in favor of the defendant.<sup>5</sup> As the plaintiff had not persuaded a majority of the jurors of the justice of his claim, he had failed to prove his case, and it was dismissed. The law was in force in fifth-century Athens. A client of Antiphon<sup>6</sup> invoked it in an argu-

<sup>1</sup> Hommel (*op. cit.*, p. 114) alone has noticed the unfairness of such a system of securing a panel for service, but the suggestion that those who fail to get a seat had only themselves to blame is scarcely a sufficient answer, for no matter how early the jurors resorted to court, *some*—between one and a hundred—would *always* be too late.

<sup>2</sup> Teusch (*op. cit.*, p. 62) has shown that the situation described by Aristophanes in the *Wasps* does not permit of the use of the lot.

<sup>3</sup> Pollux viii. 123: εἰ δὲ χιλίων δέοι δικαστῶν, συνίσταντο δύο δικαστήρια, εἰ δὲ πεντακοσίων καὶ χιλίων, τρεῖς. Cf. Demosthenes xxiv. 9; Bruck, *op. cit.*, p. 405.

<sup>4</sup> Hommel, *op. cit.*, pp. 111-12.

<sup>5</sup> Aeschylus, *Eumenides*, 741; Euripides, *Electra*, 1268-69; Aristophanes, *Frogs*, 685.

<sup>6</sup> Antiphon v. 51. The case was tried in a heliastic court under the presidency of the Eleven (Blass, *Attische Beredsamkeit*, I, 176). The jurors are presumed to be familiar with the rule as a matter of current practice in the heliastic courts.



ment before a heliastic court as a familiar rule. Evidently there was a possibility of a tie vote in a fifth-century heliastic court. This must mean that a court could function without its full complement of jurors. It is well known that members of the *boulé*, which on occasion exercised judicial functions, were frequently absent.<sup>1</sup> It could not be otherwise. No group of 500 men over thirty years of age could remain intact for a year. There would be unavoidable absences due to illness and other causes. It has been estimated that the average attendance for a year would be 400.<sup>2</sup> If 400 senators could render a valid verdict, it is reasonable to suppose that a heliastic court also could function without its full complement of jurors. In a fourth-century suit between the Delian amphictyony and a citizen of the island of Ios the number of votes cast amounted to 499.<sup>3</sup> The full complement of the court in the fourth century was 501. Lipsius<sup>4</sup> accounts for the shortage in the number of votes by assuming that for some reason or other two jurors did not vote. The law regarding an even vote was intended to apply when, through the failure of jurors to vote, the number of votes cast was evenly divided between plaintiff and defendant. Lipsius' proposed explanation of the missing votes is an admission that fewer than the full quota of jurors could render a valid verdict. From a legal standpoint it could make no difference whether the two men failed to attend or failed to vote. Four hundred and ninety-nine jurors rendered the verdict of a court of 501, just as 400 and odd senators must on occasion have expressed the decision of the Senate of Five Hundred. It was desirable that all jurors should vote. An effort to secure

<sup>1</sup> Demosthenes xxii. 36: τῷ γὰρ ἔστιν ὄνειδος, εἰ σιωπῶντος αὐτοῦ καὶ μηδὲν γράφοντος, ἴσως δ' οὐδὲ τὰ πάλλ' εἰς τὸ βουλευτήριον εἰσιόντος, μὴ λάβοι ἡ βουλή τὸν στέφανον;

<sup>2</sup> Schömann, *Griechische Alterthümer*, I, secs. 399 and 463. There is no reference to a quorum in the senate.

The average daily absences of the teachers from a Chicago public high school over a period of 120 days amounted to 2.3 per cent of the total number. The penalty for absence in case of illness is \$2.50 per day. The penalty for all other absences is the deduction of the total amount of the salary for the time of absence.

<sup>3</sup> *CIA* ii, No. 778 (825) B.

<sup>4</sup> *Op. cit.*, p. 158.

all votes was always made. But whether it was always successful, if for any reason a juror wished to evade, is uncertain. The very proclamation of the herald, "Who has not voted? Let him stand up," seems to indicate the possibility of evasion.<sup>1</sup> But on the other hand, Philocleon's desire to be always the last to vote indicates that he at least thought he knew when all had voted.<sup>2</sup> But there is another possibility which Lipsius did not note. Even if the arrangements were 100 per cent efficient in filling the quota for each jury, it must occasionally have happened that a juror was obliged through illness to leave the court during the progress of the case. His place could not be filled, for the substitute would have missed some of the evidence. When a juror falls ill in a modern jury of twelve men, as sometimes happens, the case must be tried *de novo*. There is no mention of a similar practice in Athens. We must assume that the case went on with fewer than the full complement.

An argument in favor of the theory that a full quota of jurors was required for each case has been drawn from the use of the word *πληροῦν*.<sup>3</sup> Officials were said *πληροῦν τὰ δικαστήρια*, and *τὰ δικαστήρια ἐπληρώθη*. But it has been shown that the word *πληροῦν* is used in connections in which no idea of a full quota is involved.<sup>4</sup> A case in point is the phrase *πληρουμένης τῆς ἐκκλησίας* found in Aristophanes' *Eccleziastousae*.<sup>5</sup> It means "while the ecclesia is assembling." There is no expectation that *all* members must or would be present. But even if it be admitted that *πληροῦν* has in some connections the technical meaning "provide the court with a full complement" rather than merely "summon" or "convoke," it is always used of the fourth-century jury. Aristophanes<sup>6</sup>

<sup>1</sup> Aristophanes *Wasps*, 751-55.

<sup>2</sup> Cf. *infra*, p. 377. In Aristotle's time no juror could receive his pay if he did not deposit his vote.

<sup>3</sup> Lipsius, *op. cit.*, p. 159.

<sup>4</sup> Bruck, *Philologus*, LII, 414. Lipsius, *ibid.*, refuses to accept Bruck's conclusion and quotes *πληροῦν ναῦν, τριήρη*, which must mean "supply the full complement of men."

<sup>5</sup> Line 89.

<sup>6</sup> *Wasps*, 305.

uses καθίζειν τὸ δικαστήριον in the sense of "convene" or "hold a session"; πληροῦν does not appear in this connection.

There is a reason for this difference between the fifth- and the fourth-century practice. In the later period all available jurors assembled each court day. It was easy to select and allot to each court its required complement with reasonable assurance that the case would go before a complete panel.<sup>1</sup> It was quite otherwise in the earlier period when a group was assigned to a specific court for a whole year.

In this connection it is important to notice that in the discussion of jury quotas for the fifth century no account is taken of the minor homicide courts which were manned by fifty-one ephetae until they were replaced by dicasts.<sup>2</sup> Even a group of fifty-one men could not always be available for recurring court sessions throughout the year. Inevitable absences would be sure to occur. No one seems to have offered any suggestions as to the manner in which temporary or permanent gaps in the ranks of the ephetae were filled. And yet it would seem quite as important to have a full quota in the minor homicide courts as in the heliastic courts. The odd number of the ephetae shows that it was deemed desirable to avoid a tie vote. As the ephetae were drawn from the Areopagites,<sup>3</sup> it would always have been a comparatively simple matter to fill up vacancies in their ranks, unless the absences were due to illness during the hearing of a case.

The objections to the theory that 100 supernumeraries were attached to each panel of 501 to insure a full quota at each court session may be summarized as follows. The passages in the *Wasps* of Aristophanes, relied upon to support the theory, lose their humor if so interpreted. They can all be otherwise explained in a way that brings out their full humor and fits them into the scheme of the comedy. The words πληροῦν δικαστήριον in the sense of "assign its full complement to a panel of dicasts" apparently do not occur in fifth-century sources. Even in the later period, the evidence that

<sup>1</sup> Cf. *infra*, p. 371. There was always the possibility that a juror seized by sudden illness might be obliged to leave the court before the conclusion of the case.

<sup>2</sup> Cf. *supra*, p. 234.

<sup>3</sup> Cf. *supra*, p. 99.

πληροῦν does not mean simply "convene" a jury is not wholly convincing. But there is no need to press this point, for there are strong indications that a court with less than its full quota could render a valid judgment just as the boulé occasionally did. The assignment of an odd number to each panel was intended to avoid tie votes. The law providing that a tie vote should be regarded as an acquittal shows that an even number of jurors was a possibility in a heliastic court. The theory that one or more jurors failed to vote is not a satisfactory explanation, for, if fewer than the full quota could render a valid judgment it makes no difference whether the missing votes were due to absence or failure to vote. And finally, the use of supernumeraries in the way proposed must have made it impossible to convene a court of from 1,000 to 2,000 without at least partially disrupting the system. The sole advantage of this theory is that it provided a scheme for securing panels that would not be affected by the inevitable temporary or permanent reduction in the numbers of the annual quota of jurors through absence from the city, illness, or death. But the diminution of the numbers available for service would cause no concern if a court could function without its full quota. In the fourth century it was the practice to assign odd numbers to each panel, e.g., 501, 1,001, 1,501. But there is no evidence for the practice in the fifth century. Only even numbers are mentioned. It is, however, assumed that the practice was the same and that for convenience even numbers were used. In favor of this theory may be cited the fact that the ephetae numbered fifty-one. But on the whole, the model for the fifth-century panel is quite as likely to have been the Senate of Five Hundred as the ephetae. It is of interest in this connection that commissions of the dicasts were associated, under certain conditions,<sup>1</sup> with the boulé in fixing the tribute from the cities of the empire. There is epigraphical evidence that one such commission numbered 500. Similarly, after the overthrow of the Four Hundred, a commission of 500 dicasts acted with the senate as a committee to revise the laws.<sup>2</sup>

<sup>1</sup> Robertson, *op. cit.*, p. 48.

<sup>2</sup> *CIA* i. 266. Cf. Lipsius, *op. cit.*, p. 156.

The evidence is found in the decree of Teisamenus cited by Andocides.<sup>1</sup> These figures are surely exact. Round numbers may be expected even in the forensic orations, but not in official sources. These bodies are not courts in the strict sense of the word, but it is highly improbable that these bodies would number 500 each and the courts 501. In the fourth century the situation was different. All who desired to serve appeared, and the courts needed were filled then and there. There was a reasonable certainty that the full quota would actually be present when the case was called for trial. In the fifth century it would be a much more difficult matter to secure a full complement of jurors for each case. The scheme worked out on the basis of the *Wasps* of Aristophanes is, as we have seen, so cumbersome and unfair that it has aroused doubts in the mind of even one who accepts it.<sup>2</sup>

The problem of distributing 6000 jurors into panels for service in the different courts in the fifth century would have been simpler if the panel for the normal cases numbered 500 instead of 501 and the courts could function with fewer than a full quota. The jurors could then be divided into twelve sections of 500 each, and a section assigned to a court for a year, without further concern regarding vacancies due to absences from time to time. It is impossible to determine how many courts there were in the fifth century. It would seem that the requirements of litigation in the fifth century were greater than in the fourth. Making due allowance for the exaggerations of Aristophanes, who estimates that the entire number of jurors was employed for 300 days each year, one gets the impression that, as Strepsiades in the *Clouds*<sup>3</sup> suggests, courts were in session almost every day in Athens. The importance of overseas litigation can be seen from the substantial benefits which, according to Pseudo-Xenophon,<sup>4</sup>

<sup>1</sup> i. 84.

<sup>2</sup> Hommel (*op. cit.*, p. 112) expresses doubts as to the working of the system with juries of 1,000 and 1,500, and further (p. 114) remarks on the unfairness. Lipsius is uncertain about the size of the panels, 500 or 600.

<sup>3</sup> Lines 207-8. Cf. Lipsius, *op. cit.*, p. 168. Cf. *Wasps*, 661 ff.

<sup>4</sup> *Ath. Pol.* ii. 16-17.

accrued to the citizens of Athens from the presence of overseas litigants in the city. Another indication of the pressure of litigation is the practice of holding court sessions and meetings of the *ecclesia* on the same day.<sup>1</sup> This practice was discontinued in the fourth century.<sup>2</sup> This situation would seem to have required more courts than in the fourth century, when overseas litigation had practically ceased.

All magistrates and official boards, whether judicial or executive, had the duty of presiding over the trial of cases that came within the sphere of their activities. Consequently, the number of officials entitled to preside at court sessions was considerably in excess of the number of available panels.<sup>3</sup> Panels could not be assigned for the exclusive use of each of the various boards and officials. The most practical and economical way of dealing with the needs of the situation would be to assign panels to officials with a heavy docket. In the case of those whose legal business was incidental and occasional, one panel could be assigned to several, to be used in turn as occasion demanded. Their cases would be few. In this way certain panels would always be under the chairmanship of the same officials, while the others might sit in the same courthouse under the chairmanship of two or more official boards in turn. Six courts are mentioned in fifth-century sources. They are the courts of the *thesmothetae*, of the Eleven, of the *archon*, of the *Introducers* (*εἰσαγωγεῖς*). Two have not been identified with any officials. One was τὸ *καὶνόν*, and the other is described as *πρὸς τοῖς τεχνίοις*.<sup>4</sup> Those that have been identified are perhaps the most important courts in the city. It would be natural that Philocleon, glorying in jury service, should mention the courts that he deemed most important. The other courts that might

<sup>1</sup> Aristophanes *Wasps*, 594-95. Cf. Bamberg, *Hermes*, XIII, 506 ff. Fränkel (*op. cit.*, p. 11, n. 3), followed by Van Leeuwen (notes *ad loc.*), thinks that the reference is to special assemblies only.

<sup>2</sup> Demosthenes xxiv. 80.

<sup>3</sup> Some sixteen different officials and boards entitled to preside over court sessions are listed by Lipsius (*op. cit.*, pp. 53-120).

<sup>4</sup> Cf. *supra*, p. 234.

be classed with these are those of the Polemarch, the king archon, and the Thirty, or whatever board tried the bulk of the civil cases as the Forty did in the next century. If it be supposed that panels were assigned for the exclusive use of six magistrates and boards, six would be left for the ten or a dozen other boards that had comparatively few cases in a year, including the minor homicide courts,<sup>1</sup> to be distributed according to their requirements. From these supernumerary panels also could be recruited those large juries that were sometimes assigned to the court of the thesmothetae who tried the most important political and criminal cases. Among these were indictments for illegal legislation (*γραφαὶ παρανόμων*) and impeachments (*εἰσαγγελίαι*) assigned to a heliastic court for trial. An old law required a jury of 1,000 for impeachment cases.<sup>2</sup> This number could be increased by action of the ecclesia when referring the case to a court for trial. Pericles was tried as the result of an impeachment in the second year of the Peloponnesian War, by a court of 1,500.<sup>3</sup> Similarly, in the case of the generals and taxiarchs denounced by Agoratus, shortly before the institution of the Thirty, provision was made by decree for a trial before a court of 2,000.<sup>4</sup> In 415 a *γραφή παρανόμων* was tried by a court of 6,000. The view of Fränkel<sup>5</sup> that the case was tried by a "full" meeting of the assembly has not found favor. The extraordinary increase in the number of jurors points to action by the ecclesia under the influence of the fear and excitement caused by the profanation of the mysteries and the

<sup>1</sup> Cf. *supra*, p. 242.

<sup>2</sup> Pollux viii. 53: *χιλίοι κατὰ μὲν τὸν Σόλωνα τὰς εἰσαγγελίας ἔκρινον. Lex. Cantab. εἰσαγγελία: εἰσήγγελον, ὡς μὲν Φιλόχορος, χιλίων καθεζομένων.* The law could not be Solonian as there were no heliastic courts at that time. Cf. Busolt-Swoboda, *op. cit.*, 1155.

<sup>3</sup> Plutarch *Pericles* xxxii; cf. Lipsius, *op. cit.*, p. 182, n. 17.

<sup>4</sup> Lysias xiii. 34.

<sup>5</sup> His objection (*op. cit.*, p. 89) that, since no selected group of 6,000 could ever be assembled without some absentees, the reference must be to the assembly, is not decisive. The group was not assembled as individuals. All panels were called. Those who responded constituted a large tribunal consisting of twelve sections. Even if the total number who responded fell considerably short of 6,000, they could technically be described as such, just as a meeting of 400 senators could be described as a meeting of the Senate of Five Hundred.

mutilation of the Hermae. An even more exceptional court was that made up of *all* the initiated jurors to decide between the rival claimants for the rewards offered for the discovery of the perpetrators of these outrages. The thesmothetae presided at this *διαδικασία*.<sup>1</sup> Similar courts made of all jurors who had participated in a certain campaign were drafted from the entire group to try military offenses.<sup>2</sup>

A fuller record of fifth-century litigation would doubtless disclose more cases in which large juries sat in the court of the thesmothetae. This court continued to meet in the spacious quarters formerly used by the Solonian Heliæa, from which it took its name. One gets the impression that large juries were more common in the earlier period than in the fourth century. From Pseudo-Xenophon's essay on the Athenian constitution<sup>3</sup> it is clear that the proposal to provide more and smaller juries did not meet with favor because it "would be easy to trick the small jury and bribe them to give much less just decisions." Grote,<sup>4</sup> with just appreciation of the difficulties of Athenian democracy, emphasizes the value of large panels in encouraging the adherents of democracy and in overawing its opponents among men of wealth and social standing. The murder of Ephialtes shows the lengths to which they were willing to go.

These varied and irregular requirements for jurors could have been met much more easily by distributing twelve panels among the officials entitled to preside at court sessions. A few could be assigned permanently to those officials whose duties were mainly, if not exclusively, judicial. Of the rest, some would serve those officials whose judicial duties were incidental and occasional; others would be available for enlarging the court of the thesmothetae by the addition of one or more panels.<sup>5</sup> Such a system would be much more

<sup>1</sup> Andocides i. 28.

<sup>2</sup> Lipsius, *op. cit.*, p. 143; Busolt-Swoboda, *op. cit.*, pp. 1127 and 1157. The only evidence for a court made up of soldiers who were present at the time when the military offense was committed is in the fourth century (Lysias xiv. 5).

<sup>3</sup> iii. 7.

<sup>4</sup> *Op. cit.*, V, 237.

<sup>5</sup> Bruck (*op. cit.*, p. 405) has shown that the *δικαστήρια* used to fill out the court of the thesmothetae are courts, not sections.



elastic and economical than the use of a panel of 600 to fill a court that needed only 500.

The political aspect of jury service must not be forgotten. Pericles is said to have introduced pay to increase his political strength among the masses; and Cleon, according to Aristophanes, was regarded by the dicasts as their patron and protector whom they in turn served.<sup>1</sup> The political usefulness of the dicasts would be seriously impaired if the service was not pretty evenly distributed over the whole group. That there was no grievance on this score may be rightly inferred from the failure of Bdelycleon in the *Wasps* to mention it. On the contrary, he assumes that practically all dicasts were in service constantly. This impression conveyed by Aristophanes finds some confirmation in Pseudo-Xenophon.<sup>2</sup> Among the advantages gained from having cases from overseas tried at Athens was "the receipt of pay out of the court fees all the year round." The congestion of public business in Athens, including litigation, is explained by the fact that they had more festivals and holidays than any other Greek state and "they have to decide more private and public lawsuits and official scrutinies than all the rest of the world together."<sup>3</sup> The service could be spread more evenly over the entire body of jurors by alternating panels in the busier courts. In this connection it may be noted that the evidence for the assignment of panels for regular service in specific courts does not exclude the possibility of two panels being employed alternately at intervals in one court with a heavy docket.<sup>4</sup>

Little or no information is available as to the means used in the fifth century to notify jurors of court sessions. The

<sup>1</sup> Cleon is described as κηδεμών of the jurors in *Wasps*, 242. In the *Knights* (255) he calls them to his aid:

ὦ γέροντες ἡλιασταί, φράτορες τριωβόλου,  
οὐς ἐγὼ βόσκω κεκραγῶς καὶ δίκαια κἄδικα,  
παραβηθεῖθ', ὥς ὑπ' ἀνδρῶν τύπτομαι ξυνωμοτῶν.

Cf. Rogers, *Wasps*, pp. xvi ff.

<sup>2</sup> *Ath. Pol.* i. 16.

<sup>3</sup> *Ibid.*, iii. 2.

<sup>4</sup> Hommel (*op. cit.*, p. 111) has suggested the possibility of alternating panels. Such courts as that of the thesmothetae, the Eleven, and the Thirty (Forty) must have handled the bulk of the litigation day by day.

only reference to an official notice is the mention in the *Wasps* of a σημείον, perhaps similar to the signal put up for meetings of the ecclesia.<sup>1</sup> It was taken down when the proceedings began. After that no one was admitted.<sup>2</sup> The jurors in the *Wasps* knew what cases were to be tried that day. There were three of them, if Aristophanes is to be taken literally: Laches,<sup>3</sup> an unnamed traitor from the Thracian front,<sup>4</sup> and Dracontides.<sup>5</sup> It was not unusual to have several cases tried on the same day.<sup>6</sup> This knowledge on the part of the jurors must have had an official source. Perhaps they read the notice boards among which Philocleon delighted to wander.<sup>7</sup> It was also possible that at each court session notices of the cases to come at the next sitting of the court were read. Apparently anyone interested in a case could appear before the court at the close of proceedings and urge all to be on hand for a particular case. This seems to be the explanation of the orders issued by Cleon.<sup>8</sup>

<sup>1</sup> *Wasps*, 690. Cf. *Thesmophoriazousae*, 277-78:

ὥς τὸ τῆς ἐκκλησίας  
σημεῖον ἐν τῷ Θεσμοφορείῳ φαίνεται.

<sup>2</sup> *Wasps*, 892.

<sup>3</sup> *Ibid.*, 240.

<sup>4</sup> *Ibid.*, 289.

<sup>5</sup> *Ibid.*, 157.

<sup>6</sup> Aristophanes *Clouds*, 779-80.

<sup>7</sup> Aristophanes *Wasps*, 349:

οὕτω κιτῶ διὰ τῶν σανίδων μετὰ χοιρίνης περιελθεῖν.

Cf. *ibid.*, 848:

φέρει νυν, ἐνέγκω τὰς σανίδας καὶ τὰς γραφάς.

Photius, s.v. σανίδα: τὸ λεύκωμα ὅπου αἱ δίκαι λέγονται. Scholiast on Aristophanes' *Wasps*, 349: ἡ σανίδων φησὶ τῶν περιεχουσῶν τὰ ὀνόματα τῶν εἰσαχθησομένων εἰς τὸ δικαστήριον, ποῖον δεήσει πρῶτον εἰσαχθῆναι καὶ κατὰ τάξιν.

<sup>8</sup> *Wasps*, 242. Cleon is said to have issued orders for the appearance of the jurors betimes with a goodly supply of anger.

χθὲς οὖν Κλέων ὁ κηδεμὼν ἡμῖν ἐφέιτ' ἐν ᾧρᾳ  
ἦκειν ἔχοντας ἡμερῶν ὀργὴν τριῶν πονηρᾶν  
ἐπ' αὐτόν,

Bdelycleon represents the son of Chareus, a public advocate, as entering court and warning the jurors to be on time for a case next day in which he was to be the advocate. 687 ff.

ὅταν εἰσελθὼν μειράκιόν σοι κατάπνυγον, Χαιρέου υἱός,  
ὦδὶ διαβάς, διακινηθεῖς τῷ σώματι καὶ τρυφερανθεῖς,  
ἦκειν εἴπῃ πρῶ καὶ ᾧρᾳ δικάσονθ', ὥς ὅστις ἂν ὅμων  
ὕστερος ἔλθῃ τοῦ σημείου, τὸ τριώβολον οὐ κομίζεται.

The meaning of εἰσελθὼν presents some difficulties. It should mean in the mouth of

Bdelycleon *domum tuam ingressus*, as Brunck and most editors since have taken it. Starkie (note on *Wasps* 687) thinks "it was the business of the *συνήγορος* to summon the dicasts." Obviously a personal summons could not be delivered to 500 jurors in their homes. Unquestionably Merry is right in translating "coming into court." This is the meaning of *εἰσελθεῖν* in lines 560 and 579. It is likely that any interested persons appeared before the session began or possibly at the end of the day and made informal, as well as official, announcements to the jurors. In Antiphon vi. 21 both Philocrates and the *choregus* appeared before the court of the thesmothetae. Philocrates said that the *choregus* was responsible for the death of his brother. The *choregus* answered the charge at once and on the following day (*εὐθὺς τότε καὶ αὐθις τῇ ὕστεραια*). Here the words *ἀναβὰς εἰς τὴν ἡλιαίαν τὴν τῶν θεσμοθετῶν* are used. Van Leeuwen, *Wasps*, 687, translates *εἰσελθόν* "intrans" and inquires, "Haec autem ubinam jubebantur heliastae? Ibi, opinor, quo cum diluculo convenissent. Illuc igitur *εἰσιέναι* dicitur adolescens *συνήγορος*." Van Leeuwen is wrong in suggesting the *κληρωτήριον* as the place where the notice was delivered. There was no daily allotment of jurors as Teusch (*op. cit.*, p. 62) has shown. Rogers offers quite a different explanation which has not met with favor. He thinks that the young man came forward in the assembly (*εἰσελθόν*) and moved a resolution (*εἴπη*).

## CHAPTER VIII

### THE AREOPAGUS AND DEMOCRACY

The sixth constitutional, or rather political, change is designated by Aristotle as the "supremacy of the Areopagus." This supremacy was due to the prestige gained by the Areopagus for its services in the Persian wars, and lasted for a period of seventeen years (479-462 B.C.). In the *Politics*, Aristotle describes the government of this period as *συντονωτέραν*.<sup>1</sup> In the *Constitution*<sup>2</sup> he says that the "Areopagus became strong and controlled the city." The rather vague expression *διώκει τὴν πόλιν* recalls his description of the powers of the Areopagus in the earlier period. But when one seeks to discover what specific powers the Areopagus had or how it controlled the city, he finds only such general expressions as *ἐπίσκοπος τῆς πολιτείας*<sup>3</sup> and *φύλαξ τῶν νόμων*.<sup>4</sup> After the Persian wars there was no real change in the constitution, as the words *οὐδενὶ δόγματι λαβοῦσα τὴν ἡγεμονίαν* show. Accordingly, all that Aristotle means is that the development of democracy was checked for a time, and conservative opinions and policies began to prevail. It was only natural that the democratic movement initiated by Cleisthenes should eventually lose momentum and slow down when its immediate objectives were achieved. The struggle with Persia absorbed the interests and efforts of the masses and permitted the more cautious and conservative elements to reassert themselves.

As there was no change in the constitution, the Areopagus must have used those powers and privileges that survived the democratic reforms of Cleisthenes. Now it is to be ob-

<sup>1</sup> *Pol.* 1304a. 20.

<sup>2</sup> *Ath. Pol.* xxiii. 1: *μετὰ δὲ τὰ Μηδικὰ πάλιν ἰσχυσεν ἡ ἐν Ἀρείῳ πάγῳ βουλὴ καὶ διώκει τὴν πόλιν, οὐδενὶ δόγματι λαβοῦσα τὴν ἡγεμονίαν ἀλλὰ διὰ τὸ γενέσθαι τῆς περὶ Σαλαμίνα ναυμαχίας αἰτία.*

<sup>3</sup> *Ibid.*, viii. 4.

<sup>4</sup> *Ibid.*, iv. 4. For the Areopagus in the early period, cf. *supra*, pp. 88 ff.

served that the judicial functions exercised by the assembly in the cases of Phrynichus and Miltiades<sup>1</sup> did not interfere with the judicial powers of the Areopagus. This is evident from the fact that the crisis in the opposition to the Areopagus was precipitated by the proposal of the Areopagus to try Themistocles for treason (Medism). The Areopagus also was ready to institute proceedings against men accused of plotting the overthrow of the government.<sup>2</sup> But the political supremacy of the Areopagus was due not only to the exercise of judicial and other original powers that had fallen into abeyance in the period of democratic ascendancy but also to the prominent part taken in political life by the individual Areopagites, such as Themistocles and Aristides. This is clear from the fact that Ephialtes' campaign against the Areopagus took the form of attacks upon individual Areopagites engaged in the public service. If the supremacy of the Areopagus be thus conceived, there is no reason for doubting Aristotle's listing it as a distinct era in Athenian political history.<sup>3</sup>

Aristotle gives as the seventh change in the Athenian constitution the one which Ephialtes brought about by curtailing the powers of the Areopagus: ἐβδόμη δὲ ἡ μετὰ ταύτην, ἣν Ἀριστείδης μὲν ὑπέδειξεν, Ἐφιάλτης δ' ἐπετέλεσεν καταλύσας τὴν Ἀρεοπαγίτιν βουλήν.<sup>4</sup> Earlier in the treatise Aristotle represents the reforms of Ephialtes as being brought to a conclusion in the archonship of Conon, i.e., 462-461 B.C.:

καὶ πρῶτον μὲν ἀνείλεν πολλοὺς τῶν Ἀρεοπαγιτῶν, ἀγῶνας ἐπιφέρων περὶ τῶν διωκημένων· ἔπειτα τῆς βουλῆς ἐπὶ Κόνωνος ἀρχοντος ἅπαντα περιείλετο τὰ ἐπίθετα δι' ὧν ἦν ἡ τῆς πολιτείας φυλακὴ, καὶ τὰ μὲν τοῖς πεντακοσίοις τὰ δὲ τῷ δήμῳ καὶ τοῖς δικαστηρίοις ἀπέδωκεν.<sup>5</sup>

He adds that Themistocles, himself an Areopagite, had a share in the overthrow. In the *Politics* the following statement occurs: καὶ τὴν μὲν ἐν Ἀρείῳ πάγῳ βουλήν Ἐφιάλτης ἐκό-

<sup>1</sup> Cf. *supra*, pp. 197ff.

<sup>2</sup> *Ath. Pol.* xxv. 3; cf. *infra*, p. 256.

<sup>3</sup> Cf. Busolt-Swoboda, *Staatskunde*, p. 893, who describe it as a "tendenziöse Erfindung." Cf. Lipsius, *Das Attische Recht*, p. 34, who takes a more conservative view.

<sup>4</sup> *Ath. Pol.* xli. 2.

<sup>5</sup> *Ibid.*, xxv. 2.

λουσε καὶ Περικλῆς.<sup>1</sup> It is clear from the *Constitution*, however, that in the estimation of Aristotle the attacks of Ephialtes and Pericles were distinct, for he assigns the limitations made by Pericles in the powers of the Areopagus to a time after the passing of the citizenship law in 451 B.C.: καὶ γὰρ τῶν Ἀρεοπαγιτῶν ἕνια παρείλετο.<sup>2</sup> Plutarch represents the two men as acting together: διὸ καὶ μᾶλλον ισχύσας ὁ Περικλῆς ἐν τῷ δήμῳ κατεστάσισε τὴν βουλὴν, ὥστε τὴν μὲν ἀφαιρεθῆναι τὰς πλείστας κρίσεις δι' Ἐφιάλτου.<sup>3</sup> Aristotle further mentions τοὺς τ' Ἐφιάλτου καὶ Ἀρχεστράτου νόμους τοὺς περὶ τῶν Ἀρεοπαγιτῶν.<sup>4</sup> It is clear from all of these passages that Ephialtes was regarded as the leader in the attack of 462 B.C., whoever may have been his associates. The reference to Aristideides means that he began a democratic movement which was furthered by the policy of Ephialtes. Doubtless Ephialtes had other influential democratic sympathizers and coadjutors working with him. It may be assumed that, although Pericles was responsible for a separate attack in 452 B.C., yet he was associated with Ephialtes in the attack of 462. Pericles had just come into prominence by his prosecution of Cimon (463 B.C.). As one of the democratic leaders, Ephialtes would naturally attach him to himself. It is reasonable to suppose that, immediately after the death of Ephialtes, Pericles stepped into his place and devoted himself to the execution of Ephialtes' reforms. Pericles' final attack, some ten years later than that of Ephialtes, was, as will be shown later, a part of his plan for gaining the support of the democratic party. Archestratus was evidently a supporter either of the reforms of Ephialtes in 462 or of those of Pericles in 452, and put forward some of the laws in his own name.<sup>5</sup>

<sup>1</sup> 1274a. 7.

<sup>2</sup> *Ath. Pol.* xxvii. 1.

<sup>3</sup> *Pericles*, ix. For other passages regarding the overthrow of the Areopagus, cf. *ibid.*, vii; *Cimon* x. xv; *Praec. Ger. Reip.*, x. 15; xv. 18; Pausanias I. 29. 15.

<sup>4</sup> *Ath. Pol.* xxxv. 2.

<sup>5</sup> Kenyon, *ad loc.*, suggests that he was a supporter of Ephialtes and that some of the laws appeared in his name. But Busolt (*Geschichte*, III, i, 270) supposes that Archestratus put forward the law by which Pericles deprived the Areopagus of power.

The only problem lies in the very circumstantial account of Aristotle, according to which Themistocles played a part in the reforms made by Ephialtes. Many scholars, because of the difficulty of reconciling the chronology of Aristotle and Thucydides, have rejected the testimony of Aristotle as to the participation of Themistocles on the ground that he could not possibly have been in Athens in 462 B.C., inasmuch as, according to the regularly accepted chronology, he had already fled to Persia some years prior to this date. These scholars either delete the passage or else accept it as the genuine, but incorrect, statement of Aristotle. Others, eager to accept Aristotle's words, have attempted to explain the passage in various ingenious ways. For example, a new chronology for the entire period has been suggested, but it has met with little or no acceptance. Another explanation is that the enemies of Ephialtes spread abroad a report that he was merely the tool of the absent Themistocles. Still another explanation is to shorten the period of the Areopagus' supremacy from seventeen to seven years.

Ure attempts to reconcile the accounts of Aristotle and Thucydides by supposing that Themistocles, after his ostracism and before his departure for Persia, came back to Athens for a very short time in 462 B.C., helped to organize the attack on the council, and then fled to Persia. Thucydides did not know about this and hence made some mistakes in his chronology. The chief difficulty with Ure's theory is that he fails to realize that the preliminary attacks on individual members of the Areopagus and the organization of the final attack must have consumed a far greater period of time than the few months which at most he allows Themistocles in Athens in 462 B.C.<sup>1</sup> It is clear from chapter xxv of the *Constitution* that the attack of Ephialtes was not confined to 462 B.C. but was in progress for some time prior to that date. This is the only way in which the phrase *καίπερ ὑποφερομένη κατὰ μικρόν* can be interpreted. Later in the chapter it is said that the first part of Ephialtes' procedure consisted in attacks on

<sup>1</sup> Ure, "When Was Themistocles Last in Athens?" *Jour. of Hellenic Studies*, XLI, 165 ff. For the literature of the subject, cf. this article, p. 166, nn. 7 and 8.

individual members of the senate and that afterward he took various functions from the body. The attacks on, and the gradual discrediting of, individual members of the council may well have extended over a period of several years. Ure fails to take these details of the chapter into consideration when he remarks that "the *Constitution* says distinctly that the attack did not begin till 'about seventeen years after the Persian Wars.' " It is quite possible then that Themistocles was jointly responsible with Ephialtes for the attack in that he assisted in planning some of the attacks upon individual members of the Areopagus before his ostracism in 471 B.C. Ephialtes, however, was alone responsible for the final legislation which reduced the powers of the Areopagus.

By the reforms of Cleisthenes the boulé, assembly, and courts were empowered to act in certain cases that had formerly been exclusively under the control of the Areopagus. The Areopagus, however, continued on occasion to act in these cases, although its action became so rare as to amount practically to disuse. During its supremacy, however, succeeding the Persian wars, it resumed practically exclusive control of the state. These resumed powers, doubtless both administrative and judicial, are the ones of which Ephialtes would especially desire to deprive the Areopagus. It is probable that much of Ephialtes' work consisted in limiting either to the assembly or to the boulé or to a court powers which, under the constitution of Cleisthenes, had belonged both to the Areopagus and to one or other of these bodies. The only powers left to the Areopagus were those which never had been shared with any other body. The other bodies were firmly entrenched in their powers by laws. The fact that laws were passed shows that very definite powers were involved.<sup>1</sup>

In considering the fact that Ephialtes began his operations against the Areopagus by attacks on individual members, it is necessary to understand the character of the council at this time. In 487 B.C. a system was introduced by which the archons were selected by lot from a larger group which had

<sup>1</sup> Cf. Wilamowitz, *Aristoteles und Athen*, II, 186.



been elected by ballot by the people. But up until 457 B.C. the archons continued to be chosen only from the first two citizen classes.<sup>1</sup> The Areopagus remained, therefore, to a large extent an aristocratic body. In addition this aristocratic body had gained enormous prestige through its acts at the close of the Persian wars; and prominent members of the Areopagus, during the period immediately following the wars, played an important part in political life. For example, Aristides and Themistocles, who were men of the greatest prominence at the time, were both members of the Areopagus. It is to be expected that the council would call to account any men in public life whom it discovered committing wrongful acts toward the state. On the other hand, prominent men of democratic sympathies would naturally be hostile to the aristocratic traditions of the council and would be glad of opportunities to attack individual members. This attack, on the one hand, of the aristocratic Areopagus upon prominent citizens and, on the other hand, of prominent citizens with more or less democratic sympathies upon individual Areopagites, is well illustrated by the story, as told by Aristotle, of Themistocles, Ephialtes, and the Areopagus.

In this revolution he [Ephialtes] was assisted by Themistocles, who was himself a member of the Areopagus, but was expecting to be tried before it on a charge of treasonable dealings with Persia. This made him anxious that it should be overthrown, and accordingly he warned Ephialtes that the Council intended to arrest him, while at the same time he informed the Areopagites that he would reveal to them certain persons who were conspiring to subvert the constitution. He then conducted the representatives delegated by the Council to the residence of Ephialtes, promising to show them the conspirators who assembled there, and proceeded to converse with them in an earnest manner. Ephialtes, seeing this, was seized with alarm and took refuge in suppliant guise at the altar. Everyone was astounded at the occurrence, and presently, when the Council of Five Hundred met, Ephialtes and Themistocles together proceeded to denounce the Areopagus to them. This they repeated in similar fashion in the Assembly, until they succeeded in depriving it of its power.<sup>2</sup>

Doubtless they attacked members of the council who were officials for malfeasance in office.

In his attack on the Areopagus then, Ephialtes simply

<sup>1</sup> *Ath. Pol.* xxiii. 5; xxvi. 2.

<sup>2</sup> *Ath. Pol.* xxv. 3, Kenyon's translation.

adopted the policy which members of the Areopagus were themselves following. He attacked individuals for irregularity in their official and political transactions (*περὶ τῶν διωκμένων*),<sup>2</sup> with a view to weakening the whole council by discrediting its prominent members. The final overthrow, however, and the actual curtailing of the powers of the council were due to a resolution of the people.<sup>3</sup> The reforms of Ephialtes consisted in laws which assigned to other bodies exclusively powers in which the Areopagus had formerly had a share.<sup>3</sup>

The phrase with which Aristotle describes the powers which Ephialtes took away from the council is noteworthy: *τὰ ἐπίθετα δι' ὧν ἦν ἡ τῆς πολιτείας φυλακή*.<sup>4</sup> It is obvious that Ephialtes made no attempt to deprive the council utterly of power, but rather only of those privileges through which it had general oversight of the constitution. These would be to a large extent administrative powers and also judicial powers which were connected with the administrative and political functions of the council.<sup>5</sup> So it is not to be expected that Ephialtes would disturb the homicide functions of the body.

According to Demosthenes, *τοῦτο μόνον τὸ δικαστήριον οὐχὶ τύραννος, οὐκ ὀλιγαρχία, οὐ δημοκρατία τὰς φονικὰς δίκας ἀφελέσθαι τετόλμηκεν*.<sup>6</sup> An anonymous biography represents Thucydides as defending Pyrilampes before the Areopagus on a charge of homicide. Pericles was the prosecutor.<sup>7</sup> There

<sup>2</sup> *Ibid.*, xxv. 2. Cf. Bonner, *Lawyers and Litigants*, p. 100; for details regarding the official activities of Areopagites, cf. Wilamowitz, *op. cit.*, II, 93 f.; Busolt, *Geschichte*, III, 1, 262 f.

<sup>3</sup> *Ath. Pol.* xxv. 4.

<sup>3</sup> Cf. Wilamowitz, *op. cit.*, II, 188.

<sup>4</sup> *Ath. Pol.* xxv. 2. Cf. Busolt-Swoboda, *op. cit.*, pp. 894 ff.; Wilamowitz, *op. cit.*, II, 186 ff.

<sup>5</sup> Cf. Calhoun, *Criminal Law*, p. 102: "The judicial reform that took place at this time was first and foremost a reform of criminal law and procedure, and pre-eminently of the criminal law that later was administered by the thesmothetes."

<sup>6</sup> xxiii. 66. For the great age and immutability of Athenian homicide laws, cf. Antiphon v. 14 and vi. 2.

<sup>7</sup> *Life of Thucydides* (Didot edition of Thucydides), Part II, p. 10, sec. 19. As the result of Pericles' prowess, according to the writer of this life, in the prosecution of Pyrilampes, Pericles was elected general and became the leader of the *δῆμος*. Of course it is impossible to date this case, but it seems probable that it was sometime between the reforms of Ephialtes and the final reforms of Pericles.

is a fragment of Philochorus to the effect that Ephialtes left only homicide cases to the Areopagus.<sup>1</sup> Added to this evidence is the fact that the Athenians felt that the Areopagus held this authority in homicide cases by divine right.<sup>2</sup> Another point raised by Caillemer is the fact that it is inconceivable that the Areopagus could have risen to a position of such importance again at the end of the fifth century if it had lost all of its functions and prerogatives sixty years before. It would have disappeared entirely.<sup>3</sup> The jurisdiction of the Areopagus in the *γραφὴ πυρκαιῆς* is closely connected with its jurisdiction in homicide cases, because arson might involve the loss of life. This function was not disturbed by the reforms of Ephialtes.

It is clear that the Areopagus kept certain functions in connection with impiety cases. Suits involving the sacred olives continued to be tried before the Areopagites. The seventh speech of Lysias deals with a case which was tried by the Areopagus. The court is addressed regularly as *ὦ βουλῇ*, and it is obvious that a preliminary investigation was held by a committee of the Areopagus chosen for the purpose. The committee reported to the council, which then tried the cases.<sup>4</sup> The speech makes it quite clear that a committee of the Areopagus inspected the trees once a month and that further a special commission went to visit them once a year. In this connection it may be suggested that the Areopagus regularly made its investigations through committees and had done so from early times. Aristotle represents the Areopagus as working in this way when Themistocles promised to point out to them some would-be subverters of the constitution. He took with him a committee chosen for the

<sup>1</sup> *FHG*, I, 407. Cf. Plutarch *Cimon*, xv; *Pericles*, vii; Pausanias i. 29. 15; Xenophon *Mem.* iii. 5. 20, where Socrates describes the Areopagites as deciding cases most lawfully and justly. Meier-Schömann (*Att. Process*, p. 143) advanced the theory that homicide cases were taken from the Areopagus and restored to them under the Thirty. Boeckh and O. Müller agreed. Grote, V, 368 n., refuted the theory and was followed by Philippi, *Der Areopag und die Epheten*, p. 265; Caillemer, article on the Areopagus in Daremberg-Saglio, p. 401; Lipsius, *op. cit.*, p. 34; and others.

<sup>2</sup> Cf. Aeschylus *Eumenides*, 684, and Demosthenes xxiii. 66, quoted above.

<sup>3</sup> Caillemer, *loc. cit.*

<sup>4</sup> Lysias vii. 7, 25.

purpose (τοὺς αἰρεθέντας).<sup>1</sup> With this may be compared the ephetae. Naturally a homicide would not be removed from the shrine where he had taken refuge. Hence a committee of the Areopagus was sent out to try him at the shrine. The early institution of the ephetae—sometime before Draco—indicates that the practice of using committees was very early adopted by the Areopagus. It may be supposed that the council regularly used committees in its capacity of general overseer of the constitution. If any wrongdoer were reported to the council, either by one of the members or by someone else, it is likely that the Areopagus promptly sent out a committee to investigate and to make report. The trial, if there were any, came before the whole body. It is difficult to understand otherwise how such cases could be handled by the Areopagus. Matters which could be thus dealt with would include superintendence of morals and education, impiety, supervision of the laws.<sup>2</sup>

In considering impiety cases, it seems fair to suppose that cases which were tried before the council in the fourth century were tried there continuously from the reforms of Ephialtes down until some subsequent change was made in the procedure.<sup>3</sup>

There is no doubt that a general surveillance of religious matters and of public ceremonies remained for the Areopagus. In one of the doubtful orations of Demosthenes<sup>4</sup> the story is told of Theogenes, the king archon, who married an unworthy woman, supposing her to be the daughter of Stephanus. He allowed her to perform the sacrifices to Dionysus and to administer the oath to the priestesses. On discovering her identity, the Areopagus proceeded to punish Theogenes to the full extent of its authority. The orator adds, however: οὐ γὰρ αὐτοκράτορές εἰσιν, ὥς ἂν βούλωνται, Ἀθηναίων τινὰ κολάσαι. The story shows, then, that the Areop-

<sup>1</sup> *Ath. Pol.* xxv. 3.

<sup>2</sup> For the division of the city among different groups of Areopagites, cf. Isocrates *Areop.*, 46.

<sup>3</sup> For the change in the method of handling the sacred olives, cf. *Ath. Pol.* lx. 2, 3, and *infra*, p. 363.

<sup>4</sup> *lx.* 79 ff.

agus did have a general oversight of ritual and a limited power of punishment for any abuse therein. There are other stories to the same effect. According to Plutarch,<sup>1</sup> Euripides was not willing to express openly his attitude toward the gods because he was afraid of the Areopagus. Cicero<sup>2</sup> tells of a dream which came to the poet Sophocles, revealing the identity of a man who had stolen a sacred vessel. He referred the matter to the Areopagus and that court ordered the arrest of the culprit. The man confessed in the course of the investigation and returned the stolen property.

It is clear from the foregoing that the Areopagus retained sole authority in matters involving the sacred olives and that it kept a general surveillance in all matters of religion and a limited power of punishment in such cases. It is doubtless true, however, that, in general, jurisdiction in cases of ἀσέβεια passed to the δικαστήρια. Other speeches of Lysias involving ἀσέβεια were delivered before heliastic courts,<sup>3</sup> and Andocides' speech *On the Mysteries* was delivered before a popular court, although, as in all cases involving impiety, the *archon basileus* brought the cases into court. It cannot be proved, but is merely suggested with a great degree of plausibility, that the change took place at the time of Ephialtes' reforms, the Areopagus having formerly had complete control in cases of impiety.<sup>4</sup>

The Council of the Areopagus, along with these other religious duties, had supervision of the *ιερά ὀργὰς* and other *τεμένη*, in association with various other boards and individuals:

ἐπιμελεῖσθαι δὲ τῆς ἱερᾶς ὀργᾶδος καὶ τῶν ἄλλων ἱερῶν τεμενῶν τῶν Ἀθηναίων ἀπὸ τῆσδε τῆς ἡμέρας εἰς τὸν αἰὶ χρόνον οὓς τε ὁ νόμος κελεύει περὶ ἐκάστου αὐτῶν καὶ τὴν βουλὴν τὴν ἐξ Ἀρείου πάγου καὶ τὸν στρατηγὸν τὸν ἐπὶ τὴν φυλακὴν τῆς χώρας κεχειροτονημένον καὶ τοὺς περι-

<sup>1</sup> *De plac. philos.* vii. 2; Didot, *Plutarchi Scripta Moralia*, II., p. 1072.

<sup>2</sup> *De divin.* i. 25.

<sup>3</sup> Lysias, v and vi.

<sup>4</sup> Philippi (*op. cit.*, pp. 267 f.) thinks that the reforms of Ephialtes were not concerned with cases involving religion. Lipsius, *op. cit.*, p. 366, states that cases regarding the sacred olives were the only impiety cases which continued to come before the Areopagus.

πολάρχους καὶ τοὺς δημάρχους καὶ τὴν βουλὴν τὴν αἰὲ βουλευούσαν καὶ τῶν ἄλλων Ἀθηναίων τὸν βουλόμενον τρόπον ὅτῳ ἂν ἐπίστανται.<sup>1</sup>

The Areopagus at one time had a general oversight of education and morals. This supervision may be illustrated by one particular kind of case, the *γραφὴ ἀργίας*. There is evidence that Draco instituted a law regarding idleness, *νόμος περὶ τῆς ἀργίας*, of which Solon in turn made use and which was still in effect in the fourth century.<sup>2</sup> There is also evidence that originally all *γραφαὶ ἀργίας* came before the Areopagus.<sup>3</sup> In the time of the orators, however, such cases no longer came before the Areopagus, but before heliastic courts,<sup>4</sup> for they are mentioned in a list of cases which came under the cognizance of the archon.<sup>5</sup> These cases may be taken as typical of what happened to the Areopagus' censorship of morals. The council would continue, as in other cases, to have the right which every citizen had of bringing such cases to the attention of the authorities, but it would no longer have the authority to settle them itself. The archon would take care of them. It may be assumed that the Areopagus acted as is described by Isocrates,<sup>6</sup> who represents the members as dividing the city into sections, different members being responsible for different sections and watching the lives of the citizens and making reports of unruly ones. There is an interesting passage in the Pseudo-Platonic *Axiochus*,<sup>7</sup> which gives to a commission of the Areopagus along with the *σωφρονισταί* some control over the ephebi. The relationship is wholly undefined, and the passage is very puzzling. Girard,<sup>8</sup> who believes that the institution of the ephebi belongs at least to the beginning of the fifth century, if not earlier,

<sup>1</sup> *Bulletin de correspondance hellénique*, XIII, 434, ll. 15 ff.; cf. *IG*, II, Supplement 104a; Dittenberger, *Sylloge*<sup>2</sup>, II, 789; De Sanctis, *Storia della Repubblica Atiniese*, p. 423, n. 3.

<sup>2</sup> *Lex. Cant.* s.v. *ἀργίας δίκη*, quoting Lysias; Diog. Laert. i. 55, quoting Lysias.

<sup>3</sup> Plutarch *Solon*, xxii; cf. Athenaeus, 168 A.

<sup>4</sup> *Lex. Seguer.* in Bekker, *Anec.* I. 310. 3.

<sup>5</sup> Cf. Lipsius, *op. cit.*, p. 354.

<sup>6</sup> *Areop.*, 46.

<sup>7</sup> 367 A.

<sup>8</sup> Daremberg-Saglio, article "Ephebi," pp. 621 f.

thinks that the Areopagus lost its supervision of the ephebi under Ephialtes, but that after the Thirty it again had some undeterminable relation to them. The writer of the *Axiochus* may have confused the earlier powers which the Areopagus had in this regard with the later period.<sup>1</sup>

The function of the Areopagus which is particularly stressed in the early period, that is, both in Solon's constitution and in the period before Solon, is the general oversight of the laws and the constitution: τὴν δὲ τῶν Ἀρεοπαγιτῶν ἔταξεν ἐπὶ τὸ νομοφυλακεῖν, ὥσπερ ὑπῆρχεν καὶ πρότερον ἐπίσκοπος οὔσα τῆς πολιτείας.<sup>2</sup> The terms are vague and it is a question just how definite or extensive were the powers described. The best explanation, in view of later activities of the council, seems to be that the powers represented here meant always simply the duty of watching the magistrates and insuring that their administrations should be entirely in accord with the laws (κατὰ τοὺς νόμους). This, then, would give the council at any time the right to suspend a magistrate's unlawful decision. This is brought out very clearly in the only acceptable portion of the so-called Draconian constitution: ἡ δὲ βουλή ἢ ἐξ Ἀρείου πάγου φύλαξ ἦν τῶν νόμων, καὶ διετήρει τὰς ἀρχάς, ὅπως κατὰ τοὺς νόμους ἄρχωσιν. ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλὴν εἰσαγγέλλειν, ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον.<sup>3</sup> This function of the council, which for purposes of convenience will be here termed νομοφυλακία, was doubtless taken from the council by Ephialtes. According to Philochorus,<sup>4</sup> a new board, called νομοφύλακες, seven in number, was instituted at the time when Ephialtes curtailed the powers of the Areopagus. This passage has been suspected for various reasons, chiefly because the board is never elsewhere heard of until many years after the time of Ephialtes and because the number "seven"

<sup>1</sup> For the date of the ephebi, cf. also Lofberg, *Class. Phil.*, XX, 330 ff., who believes that the institution certainly existed in the fifth century. In favor of a later date, cf. Forbes, *Greek Physical Education*, p. 113.

<sup>2</sup> *Ath. Pol.* viii. 4.

<sup>3</sup> *Ibid.*, iv. 4; cf. *supra*, p. 95.

<sup>4</sup> Müller, *FHG*, I, 407. Cf. Lipsius, *op. cit.*, pp. 35-36.

corresponds to nothing in Athenian institutions.<sup>1</sup> According to this view, Philochorus was really speaking of a board called νομοφύλακες, which was instituted at the end of the fourth century; but he was wrong about the date of its institution. It is true that the lexicographers generally, in describing these officials, are reproducing the characteristics of the fourth-century board.<sup>2</sup> Among the duties which, according to Harpocration, Philochorus attributed to the body was the one of compelling the magistrates to keep the laws (τοῖς νόμοις χρῆσθαι). Now it is known that this duty was restored to the Areopagus by the Thirty by the decree of Teisamenus: ἐπιμελείσθω ἡ βουλὴ ἡ ἐξ Ἀρείου πάγου τῶν νόμων, ὅπως ἂν αἱ ἀρχαὶ τοῖς κειμένοις νόμοις χρῶνται.<sup>3</sup> Presumably it had been taken from the council at the time of Ephialtes. Philochorus may have been correct in asserting that the νομοφύλακες were instituted at the time of Ephialtes' reforms, to take over the function of νομοφυλακία hitherto exercised by the Areopagus. On the other hand, he may merely have supposed, on the basis of the fourth-century νομοφύλακες, that a similar situation existed in the interim between Ephialtes and the restoration of power to the Areopagus under the Thirty. The question cannot be settled.

Keil, in his edition and interpretation of a Strassburg papyrus which he believed to contain some fragments of history of the Periclean age, argues very plausibly on the basis of a notice about the νομοφύλακες that they must have been instituted under Ephialtes and dissolved by the Thirty.<sup>4</sup> The papyrus, however, is of no value in settling the matter, inasmuch as it contains not fragments of a history of the

<sup>1</sup> Cf. Gilbert, *Greek Constitutional Antiquities*, p. 155; Philippi, *op. cit.*, pp. 185 ff., who thinks that the institution was connected with the reforms of Ephialtes but was of slight importance. For the literature of the subject cf. Busolt-Swoboda, *op. cit.*, p. 895, n. 1.

<sup>2</sup> Cf. Müller, *op. cit.*; Suidas, s.v.; Pollux viii. 94; Harpocration, s.v.; Photius, s.v.

<sup>3</sup> Andocides i. 84.

<sup>4</sup> *Anonymus Argentinensis*, pp. 170 ff.; cf. Lipsius, *op. cit.*, p. 35, and Vinogradoff, *Outlines of Historical Jurisprudence*, Vol. II, p. 136 ff.



Periclean age, as Keil thought, but rather a table of contents prefixed to a biography of Demosthenes. Many of the emendations of Keil's edition have been shown to be incorrect, and no great importance can be attached to the document.<sup>1</sup>

Illegal legislation was dealt with by means of the *γραφὴ παρανόμων*, which doubtless also was established at the time of Ephialtes.<sup>2</sup> The cases of *γραφὴ παρανόμων* which are known from the fifth century yield little information either as to grounds of action or procedure. But it was such a formidable process that the Four Hundred, as one of their first measures, suspended it, along with certain other important suits, to protect themselves in introducing any sort of legislation that they desired: *ἔπειτα τὰς τῶν παρανόμων γραφὰς καὶ τὰς εἰσαγγελίας καὶ τὰς προσκλήσεις ἀνείλον*.<sup>3</sup> If the *γραφὴ παρανόμων* had been left to the democrats as a weapon against the oligarchs, they would have found difficulty in legally putting any of their plans into effect. The surest method, then, was to abolish all processes by which the democrats could attack them for illegality of action. This is particularly well brought out by Thucydides' description of the events of this time:

καὶ ἐσθνεγκαν οἱ ξυγγραφῆς ἄλλο μὲν οὐδέν, αὐτὸ δὲ τοῦτο, ἐξεῖναι μὲν Ἀθηναίων ἀνατεῖ εἰπεῖν γνώμην ἣν ἂν τις βούληται ἣν δὲ τις τὸν εἰπόντα ἢ γράψεται παρανόμων ἢ ἄλλῳ τῷ τρόπῳ βλάβῃ, μεγάλας ζημίας ἐπέθεσαν.<sup>4</sup>

The fact that the *γραφὴ παρανόμων* had become such an important process under the democracy before the time of the Four Hundred suggests, although it cannot be absolutely proved, that the institution of the process belongs to the last

<sup>1</sup> Cf. Cary, *Documentary Sources of Greek History*, p. 4. De Sanctis, *op. cit.*, p. 439, maintains that the *νομοφύλακες* were not introduced by Ephialtes, but belonged only to the fourth century.

<sup>2</sup> Cf. Busolt-Swoboda, *op. cit.*, p. 896; Schulthess, *Das attische Volksgericht*, p. 22; Fränkel, *Die attischen Geschworenengerichte*, p. 66; Schreiner, *De corpore iuris atheniensium*, p. 18; Lipsius, *op. cit.*, p. 36; Botsford, *The Athenian Constitution*, p. 222; *CAH*, V, 100; Wyse in Whibley, *Companion to Greek Studies*, p. 357; Wilamowitz, *op. cit.*, II, 193, believes that the *γραφὴ παρανόμων* was instituted by Solon. Cf. Loedgberg, *Animadversiones de actione παρανόμων* (Upsala, 1898), pp. 63 f.

<sup>3</sup> *Ath. Pol.* xxix. 4.

<sup>4</sup> viii. 67.

period of constitutional reform prior to that time, namely, the reforms of Ephialtes. If Ephialtes took away *νομοφυλακία* from the Areopagus and gave it to the people, it is reasonable that he should have devised some process by which they could execute their guardianship of the laws. This is true, regardless of the existence or non-existence of the *νομοφύλακες* during the fifth century.

The earliest known instance of the use of the *γραφὴ παρανόμων* is in 415 B.C., after the mutilation of the hermae and the profanation of the mysteries. Speusippus proposed in the senate to turn over to a court certain men who were accused of participation in the profanation of the mysteries, among them Leogoras, the father of Andocides. Leogoras indicted Speusippus by a *γραφὴ παρανόμων*, and the case was tried before a jury of 6,000. Speusippus did not obtain even 200 votes.<sup>1</sup> The small number of votes favorable to Speusippus indicates that the jury must have considered his act grossly illegal, but the ground for the *γραφὴ παρανόμων* is not known.

In 406 B.C., after the Battle of Arginusae, the eight generals who had participated in the encounter were deposed and recalled to Athens on the charge of failing to rescue the men from the wrecked ships. Six returned to Athens, and on action of the senate they were turned over to the assembly for trial. Their first hearing before that body was ended, before a decision was reached, by a plea that darkness would prevent the taking of a vote by show of hands. At this time the senate was instructed to prepare and bring a resolution before the assembly providing for the trial of the generals. On the motion of Callixenus a *προβούλευμα* was passed and brought into a meeting of the assembly to the effect that, on the basis of the information gained at the former meeting of the assembly, all of the Athenians should vote by tribes on the guilt or innocence of the generals.

Ἐπειδὴ τῶν τε κατηγορούντων κατὰ τῶν στρατηγῶν καὶ ἐκείνων ἀπολογουμένων ἐν τῇ προτέρᾳ ἐκκλησίᾳ ἀκηκόασι, διαψηφίσασθαι Ἀθηναίους ἅπαντας κατὰ φυλάς. θεῖναι δὲ εἰς τὴν φυλὴν ἐκάστην δύο ὕδριας

<sup>1</sup> Andocides i. 17.

ἐφ' ἐκάστη δὲ τῇ φυλῇ κήρυκα κηρύττειν, ὅτῳ δοκοῦσι ἀδικεῖν οἱ στρατηγοὶ οὐκ ἀνελόμενοι τοὺς νικήσαντας ἐν τῇ ναυμαχίᾳ, εἰς τὴν προτέραν ψηφίσασθαι, ὅτῳ δὲ μή, εἰς τὴν ὑστέραν.

The *προβούλευμα* went on to specify the extreme penalty in case of condemnation: *ἀν δὲ δόξωσιν ἀδικεῖν, θανάτῳ ζημιῶσαι καὶ τοῖς ἔνδεκα παραδοῦναι καὶ τὰ χρήματα δημοσιεῦσαι, τὸ δ' ἐπιδέκατον τῆς θεοῦ εἶναι*. Various men in the *ecclesia*—*Εὐρυπτόλεμός τε ὁ Πεισιάνακτος καὶ ἄλλοι τινές*—at once challenged this motion and proposed to indict Callixenus, who had moved the resolution, by a *γραφὴ παρανόμων*.<sup>1</sup> Xenophon does not specify the grounds for this *γραφὴ παρανόμων*, but some are fairly obvious. In the first place, the *boulé* had been instructed to bring in a resolution which provided for a trial of the generals. This they failed to do, merely introducing a resolution which provided that a vote should be taken on the basis solely of the evidence produced at the former assembly. The proceedings on that occasion had not constituted a real trial but had been rather in the nature of a preliminary investigation. There had not been sufficient time for the generals adequately to prepare their defense. Furthermore, according to the senate's resolution, the assembly was instructed to vote on all of the generals at once. According to Athenian law, every man was entitled to an individual trial. It is interesting to note that the charge that Callixenus had introduced an illegal motion was brought by various members of the *ecclesia*, the point apparently being that men from all over the assembly, immediately on the reading of the senate's resolution, sprang up and challenged it. This is doubtless the explanation of the fact that several people are said to have indicted Callixenus. The assembly, however, did not permit the blocking of the resolution, for a motion of Lysicles that those who had proposed the indictment should be included in the senate resolution forced the withdrawal of the indictment. But in many cases resolutions must have been suspended by such an indictment.

During the democratic exile which was occasioned by the rule of the Thirty Tyrants, the orator Lysias was very active

<sup>1</sup> *Hellenica* i. 7. 9 ff.

in the democratic cause. Immediately after the expulsion of the Thirty (403 B.C.) and the democratic return, it was proposed and carried in the assembly that citizenship should be conferred on Lysias. The Senate of Five Hundred had not yet been re-established. Therefore, there had been no *προβούλευμα* with regard to this proposition; and on this ground a *γραφὴ παρανόμων* was brought against Thrasybulus, who was responsible for the motion in the ecclesia.<sup>1</sup> Lack of a *προβούλευμα* would always have constituted a reason for the bringing of a *γραφὴ παρανόμων*. The whole story has been the object of suspicion. Jebb,<sup>2</sup> however, thinks that it cannot be doubted in view of the biographer's specific reference to a speech of Lysias in connection with the matter.

It has been held that the Areopagus retained its police oversight of building, and this may well be the case.<sup>3</sup> This must not be taken to mean, however, that cases of infringement of building regulations were tried before the Areopagus, at least after Ephialtes. The cases themselves would be brought before a court or before the people. For instance, in the Pseudo-Xenophontic *Constitution of Athens*, the author, in enumerating the variety of cases which came before the courts, writes: *δεῖ δὲ καὶ τάδε διαδικάζειν εἴ τις τὴν ναῦν μὴ ἐπισκευάζει ἢ κατοικοδομεῖ τι δημόσιον*.<sup>4</sup> As Kalinka, in his edition, observes on the passage, *διαδικάζειν* seems to be used here as a general word for bringing a case into court, and not in its older, technical sense. The writer is speaking of the congestion of business in the city and the difficulty of getting settlements. It is quite possible that the Areopagus originally, in addition to its general oversight of building, also itself tried cases of infringement of regulations, while, after the reforms of Ephialtes, they retained the general oversight, the cases themselves now being referred to a court. That this was the case, in the fourth century at least, seems certain from a passage in a speech of Aeschines, where the Areopagus is represented as appearing before the people in accordance with a resolution which one Timarchus had in-

<sup>1</sup> (Plut.) *X Oratorum Vitae* 835 F.

<sup>3</sup> Cf. Philippi, *op. cit.*, p. 268.

<sup>2</sup> *Attic Orators*, I, 149.

<sup>4</sup> iii. 4.

roduced regarding the houses on the Pnyx.<sup>1</sup> Just what the resolution was it is impossible to say, but it apparently dealt with building improvements on the Pnyx to be carried out largely by the government. As in the matter of the supervision of morals, so in the matter of building regulations the council lost its power to try cases but retained its general supervision.

In the time of Solon the Areopagus was concerned to some extent with the *δοκιμασία* and *εἵθυνα* of magistrates.<sup>2</sup> It is generally believed that that body continued to exercise these two functions until the reforms of Ephialtes.<sup>3</sup> Naturally Ephialtes would remove these very important powers from the Areopagus. The *δοκιμασία* of the archons was turned over to the *boulé*,<sup>4</sup> while the examination of other officials and the *εἵθυνα*<sup>5</sup> were taken care of by the courts. Hence, to this same period may be assigned the institution of the Board of Thirty Logistae, which is known to have been active as early as 454 B.C.<sup>6</sup> This board was reduced to ten members in the fourth century, and they acted in conjunction with a jury of 501 dicasts.<sup>7</sup>

In connection with *δοκιμασία* it may be suggested that the Areopagus, which had oversight of conduct generally, may very well have had charge of the *δοκιμασία* of boys in earlier times. At the time when Aristotle wrote the *Constitution of Athens*, the Senate of Five Hundred had charge of this *δοκιμασία* after the preliminary enrolment of the boys by the demesmen (*δημόται*).<sup>8</sup> Aristotle's statement appears to be at

<sup>1</sup> Aeschines *Tim.*, 80 ff.

<sup>2</sup> Cf. *supra*, p. 164.

<sup>3</sup> Cf. Lipsius, *op. cit.*, p. 37; Wilamowitz, *op. cit.*, II, 188 ff.; Schulthess, *op. cit.*, p. 22.

<sup>4</sup> Cf. Busolt-Swoboda, *op. cit.*, p. 1045.

<sup>5</sup> Cf. *ibid.*, p. 895.

<sup>6</sup> Cf. Gilbert, *op. cit.*, p. 225, with the inscriptional evidence there cited; cf. Busolt-Swoboda, *op. cit.*, p. 1077 and § 128.

<sup>7</sup> Cf. Aristotle *Ath. Pol.* liv. 1, 2; and Gilbert, *op. cit.* There was also a committee of the *boulé* called *λογισταί*, ten in number. This committee had to do with the monthly reports of officials and is distinct from the Board of Logistae which audited the annual reports. Cf. Busolt-Swoboda, *op. cit.*, p. 1032.

<sup>8</sup> *Ath. Pol.* xlii. 1. Cf. the scholiast on *Wasps*, 578, who refers to this passage: *πρὸς τὸ ἔθος*. 'Αριστοτέλης δὲ φησιν ὅτι ψήφῳ οἱ ἐγγραφόμενοι δοκιμάζονται, μὴ νεώτεροι ἢ ἐτῶν εἰεν. ἴσως δ' ἂν περὶ τῶν κρινόμενων παίδων εἰς τοὺς γυμνακοὺς ἀγῶνας λέγοι [sc. ὁ Ἀριστοφάνης]. οὐχ ὡς ἐν δικαστηρίῳ κρινόμενων ἀλλ' ὑπὸ τῶν πρεσβυτέρων.

variance with the picture which Aristophanes presents in the *Wasps* of the delight of the old jurors at their participation in the examination of boys:

παίδων τοίνυν δοκιμαζομένων αἰδοῖα πάρεστι θεᾶσθαι.<sup>1</sup>

Many attempts have been made to harmonize the two passages. Aristotle, in the passage cited, says that, in case the demesmen rejected a boy on the ground that he was not of free citizen birth, an appeal to a dicastery was permitted. It has been suggested that Aristophanes was referring to such appeals.<sup>2</sup> Sandys suggests also that, although Aristotle does not mention it, such appeals were allowed in cases where a boy was rejected because he was not of the proper age.<sup>3</sup> Lipsius<sup>4</sup> thinks that the *δοκιμασία* mentioned in Aristophanes was an examination of orphans as to puberty, preceding their registration in a deme.

There is no evidence that in early times the members of the Areopagus were themselves subject to an *εὔθυνα*. In later times, however, there is evidence that they were.<sup>5</sup> However, it is impossible to say how often it occurred, that is, whether they would have to pass an *εὔθυνα* after they were once admitted to the council, or were subject to *εὔθυνα* once a year thereafter or as a group had to undergo an *εὔθυνα* after the completion of some special commission.

In connection with these questions it has been suggested<sup>6</sup> that the final authority which the Areopagus had had under Solon was taken away and its decisions made subject to appeal. Dugit makes even its decisions in homicide cases hence-

<sup>1</sup> Line 578. Cf. Starkie's note on the line.

<sup>2</sup> Cf. Sandys on Aristotle, *ad loc.*

<sup>3</sup> Cf. Zielinski, *Philologus*, LX, 11.

<sup>4</sup> *Op. cit.*, p. 284. Lipsius bases his opinion on a passage of the Pseudo-Xenophontic *Constitution of Athens* iii. 4, which Kirchhoff had already connected with the Aristophanic passage, *Über die Schrift vom Staat der Athener*, p. 23. Cf. *Lex. Seguer.*, p. 235, 13, where a *δοκιμασία* of orphans is mentioned with a view to their proving their ability to manage their property themselves: *δοκιμάζονται δὲ καὶ οἱ ἐφ' ἡλικίας ὀρφανοὶ εἰ δύνανται τὰ πατρῶα παρὰ τῶν ἐπιτρόπων παραλαμβάνειν*. Lipsius assumes a different arrangement of the *δοκιμασία* in the fifth and fourth centuries.

<sup>5</sup> Lipsius, *op. cit.*, p. 288.

<sup>6</sup> Dugit, *Étude sur l'Areopage athénien*, p. 147.

forth subject to appeal, but this is extremely unlikely on religious and conservative grounds.

After Cimon's return from exile (457 B.C.), he attempted to undo Ephialtes' work of depriving the Areopagus of power, but without avail.<sup>1</sup> And in 451-450 B.C. Pericles, in pursuance of his policy of pleasing the people, further stripped the council of power.<sup>2</sup> Ephialtes had left very little to the Areopagus except its jurisdiction in homicide cases. It is natural, therefore, in seeking to discover the changes made by Pericles in the Areopagus, to connect them with the homicide functions of the body. Although Ephialtes had curtailed the Areopagus in practically all of its other activities, he evidently left the homicide courts intact. When, then, subsequently, Pericles τῶν Ἀρεοπαγιτῶν ἔνια παρείλετο,<sup>3</sup> about the only change which he could have made was to substitute dicasts for the commissions of the Areopagus which sat in the ephetic courts. An adequate motive for such a change is to be found in his inauguration of pay for dicasts as a bid for popular favor in his contest with the wealthy Cimon. It is only natural that he should increase the amount disbursed by the state by extending the jurisdiction of the dicasts.<sup>4</sup> Aristotle's failure to mention at this point the transfer of the three homicide courts to heliastic jurors is easily explained. The ephetae are Areopagites. Hence the transfer would be included in the diminution of the powers of the Areopagus. The general tendency of Athenian constitutional development from the time of Solon was to throw more and more power into the hands of the heliastic courts. The substitution of dicasts for ephetae is a natural and important step in this development.

The prevailing view, however, is that in the ephetic courts *δικασταί* were not substituted for the *ἐφῆται* until shortly

<sup>1</sup> Plutarch *Cimon*, xv.

<sup>2</sup> Aristotle *Ath. Pol.* xxvii. 1.

<sup>3</sup> Aristotle, *ibid.*; cf. Plutarch *Pericles*, ix.

<sup>4</sup> Rauchenstein (*Philologus*, X, 603) says that Pericles limited the powers of the ephetae at this time to deciding whether a case was premeditated or unpremeditated homicide. Cf. Lipsius, *op. cit.*, p. 26, n. 83; cf. Wyse, in Whibley, *op. cit.*, p. 391: "Whether this ancient institution [the ephetae] survived at all under the developed democracy is doubtful."

after the revision of Draco's laws in 409-408 B.C. It is certain that the change had been made at the date of Isocrates' oration against Callimachus, which was delivered in 402 or 399. In this speech 500 dicasts are mentioned as sitting at the Palladium.<sup>1</sup> An oration of Demosthenes delivered about the middle of the fourth century represents 500 dicasts as trying a case in the Palladium.<sup>2</sup> The first speech of Lysias, which in all probability belongs to the period after the overthrow of the Thirty, was delivered before the Delphinium, where the court must have consisted of dicasts.<sup>3</sup> In the first place the members of the court are addressed as ὦ Ἀθηναῖοι,<sup>4</sup> which is by no means a probable form of address for a court composed of a small section of the Areopagus, but which suits admirably a popular jury. Furthermore, the orator speaks to the jurors as if they were a large, representative body of the Athenian people. For example, he tells them that their vote is the most powerful in the city: πάντων τῶν ἐν τῇ πόλει κυριωτάτη.<sup>5</sup> Although regular heliastic juries sat in the courts of the Palladium and Delphinium, there are indications that the name "ephetae" for the jurors in these courts survived. Demosthenes, in a speech delivered in 352 B.C., describes these jurors as ἐφέται.<sup>6</sup> Aristotle also, in a discussion of the Athenian homicide courts of his own time, represents ephetae as sitting in the Palladium, Delphinium, and

<sup>1</sup> xviii. 52. 54. Blass dates this speech in 399; Jebb in 402. For the number of jurors, cf. Lipsius, *op. cit.*, p. 158, n. 76. Drerup reads πενταλοσίων in his edition instead of the traditional ἑπτακοσίων, which is now regarded as incorrect.

<sup>2</sup> lix. 10.

<sup>3</sup> For the date cf. Thalheim, *Lysias*, p. xxxvi. Sandys, *Aristotle's Constitution of Athens*, p. 230, says there is "nothing to show whether it was delivered before δικασταί (Schömann, Scheibe, Frohberger, Blass, Philippi) or before ἐφέται (Forchhammer and others) in the court of the Delphinium."

<sup>4</sup> Lysias i. 6, 7. Elsewhere the jurors are addressed as ὦ ἄνδρες. In extant forensic speeches the Areopagus is regularly addressed as ὦ βουλή. The regular form of address to the heliastic jurors is ὦ ἄνδρες δικασταί, varied by ὦ ἄνδρες and ὦ Ἀθηναῖοι. Nowhere do we find ὦ ἐφέται used in addressing a jury.

<sup>5</sup> i. 36. Cf. 30, 34.

<sup>6</sup> xiii. 38. For the retention of the name, cf. Keil, *Die Solonische Verfassung*, p. 107. Religious conservatism accounts sufficiently for the retention. Cf. Suidas and Photius, *s.v.* ἐφέται: ἐκαλεῖτο δ' αὐτῶν τὰ δικαστήρια, Ἐφετῶν.



Phreatto.<sup>1</sup> The lexicographers, drawing their information from Demosthenes and Aristotle, continue to use the term *ἐφέται*.<sup>2</sup> There was no need to change the name simply because the men were differently recruited.

These passages show conclusively that the substitution had been made by the beginning of the fourth century. The majority of modern scholars base their conclusion that the change had occurred only shortly before this time on the argument that the word *ἐφέται* would not have been used in the redaction of Draco's homicide laws (409-408 B.C.) if heliastic jurors had sat in the ephetic courts at that time.<sup>3</sup> This argument, however, is of no significance in view of the fact mentioned above that in the time of Demosthenes and Aristotle, for which there is indisputable evidence that heliastic jurors sat in the minor homicide courts, the name *ἐφέται* still survived in official documents.<sup>4</sup> In the inscription, which has been largely restored from the laws interpolated in speeches of Demosthenes, the ephetae are mentioned in four passages. At the beginning there is the following provision in connection with the procedure in a trial for unpremeditated homicide: καὶ ἐὰν [μ'] ἐκ [π]ρονο[ία]ς [κ]τ[ένει τις τινα, φεύγει, δ]ικάζειν

<sup>1</sup> *Ath. Pol.* lviii. 4: οἱ λαχόντες ταῦτα ἐφέται. The word *ἐφέται* here is a restoration, but it seems to be the only possible one, for Harpocration derived his statement about the ephetae from Aristotle, and this is the only passage where the word can have occurred. Kenyon in his latest edition reads *ἐφέται*. The latest Teubner text makes no restoration at this point.

<sup>2</sup> Cf. Harpocration, Photius, Suidas, s.v., Pollux viii. 125, scholiast on Aeschines ii. 87. Miller, article "Ephetai" in Pauly-Wissowa, explains the statement of Pollux, κατὰ μικρὸν δὲ κατεγελάσθη τὸ τῶν ἐφετῶν δικαστήριον, as referring to the gradual loss of prestige on the part of the ephetic courts before dicasts were substituted for the ephetae. Sandys, on Aristotle *Ath. Pol.* lviii. 4, says that the ephetae perhaps retained their jurisdiction in a formal sense, acting as a sort of presiding committee while the actual voting was in the hands of the dicasts. It may be suggested that the Athenians made a jest of the legal fiction involved in calling dicasts "ephetae" and that the reference is to a time when even the official designation of "ephetae" was dropped and the jurors were known only as "dicasts."

<sup>3</sup> Lipsius, *op. cit.*, p. 40; Keil, "Griechische Staatsaltertümer," in Gercke-Norden, *Einleitung in die Altertumswissenschaft*, III, 350; Lécrivain, article "Ephetai" in Daremberg-Saglio; Miller, *op. cit.*; Philippi, *op. cit.*, pp. 318 ff.

<sup>4</sup> It is interesting to note that the same scholars who use this argument admit that the name ephetae continued to be used in the fourth century. Cf. Miller, *op. cit.*

δὲ τὸς βασιλέας αἰτ[ι]δ[ν] φό[νο] εἰ [ἐάν τις αἰτιᾶται ἡὸς βου]λεύσαντα, τὸς δ[ε] ἐφέτας διαγν[ῶναι].<sup>1</sup> Later in the code the expression τοὺς ἐφέτας διαγνῶναι occurs again in a passage regarding the procedure to be followed in dealing with a person who has killed an exiled murderer while he is observing the requirements of his interdict; and again in a provision about justifiable homicide.<sup>2</sup> Elsewhere in the inscription, however, in a provision regarding the granting of *αἵδεσις* to an exiled murderer when there are no relatives of his victim living, the following sentence occurs: ἐὰν δὲ τούτων μεδ' ἡὲς εἰ, κτένει δὲ ἄκο[ν], γ[ν]ῶσι δ[ε] ἡ[οι πεν]τ[έκοντα καὶ ἡὲς ἡοι ἐφέται ἄκοντα κτεῖναι, ἐσέσθ[ο]ν δέ[κα ἡοι φράτερες ἐὰν ἐθέλουσιν. τούτος δ]ε [ἡοι πεντέκο]ντ[α καὶ] ἡὲς ἄρ[ι]σ[τίνδεν] χαιρέσθον.<sup>3</sup> It is noteworthy that in this case alone in the code the number of the ephetae is specified. The distinct reference here to fifty-one ephetae occurring between two sections where they are called ephetae only must have some significance.<sup>4</sup> The passage in which the number occurs deals, not with the actual homicide trial, but with a subsequent action. A murderer, after serving a term of exile, might be granted *αἵδεσις* by the relatives of his victim. But if there were no relatives, he might still obtain *αἵδεσις*. If a body of fifty-one ephetae, on reviewing the original trial, confirmed the judgment that the act was unpremeditated, then ten phratry members chosen by this body might grant the exile permission to return.<sup>5</sup> In the homicide trial itself, however, the inscription

<sup>1</sup> Lines 11 ff. For interpretation of the various provisions of the code, cf. *supra*, pp. 110 ff.

<sup>2</sup> Lines 26 ff.; 33 ff.

<sup>3</sup> Lines 16 ff.

<sup>4</sup> It is noteworthy that this is the case also with the laws inserted in Demosthenes (xxiii. 37; xliii. 57; etc.) from which the restoration of the code was largely made. Demosthenes xliii. 57, from which the present restoration was made, reads *ἡ οἱ ἐφέται*, but the word *ἡ* is probably a misinterpreted rough breathing. Or it may be regarded as an explanatory *ἡ* ("that is to say"). Cf. Hicks and Hill, *Greek Historical Inscriptions*, No. 78, l. 14, and *supra*, p. 112.

<sup>5</sup> It is to be observed that γνῶσι is here used of the ephetae, while in the three other passages διαγιγνώσκειν is used of their decision in an actual trial. Evidently the lawgiver, in the case of *αἵδεσις*, attempted to differentiate the function of the fifty-one ephetae. The fifty-one here act like a modern board of pardons which

makes no mention of the number of ephetae who were to act. The explanation is then simple. The situation affords an excellent example of the tendency of Athenian institutions to persist generation after generation in more or less modified form. The original ephetic courts were composed of fifty-one men chosen as commissions of the Areopagus.<sup>1</sup> At some time, however, prior to the redaction of Draco's laws in 409-408 B.C., heliastic jurors were substituted for ephetae in these courts. In only one particular phase of homicide cases, the granting of *aĩδεσις* to murderers in exile, did a body of fifty-one ephetae continue to function.<sup>2</sup> It appears, then, that the Athenians of 409-408 made a real revision of the Draconian code and did not blindly continue to speak of fifty-one ephetae when large panels of dicasts actually sat in these courts.

This view of the composition of the ephetic courts at the time of the revision of Draco's laws is consistent with the other passages in which the term occurs. A passage which has usually been considered of equal weight with the Draconian code in proving a late introduction of heliastic jurors into the ephetic courts is the amnesty law which was passed after the battle of Aegospotami in 405.<sup>3</sup> But here again the phrase *τῶν ἐφετῶν* may be explained as a survival. It is a concise way of referring to the courts of the Palladium, the Del-

reviews a case and makes a recommendation to the chief executive of the state. The term *γνώσι* may very well express this action. Cf. Kennedy's translation of Demosthenes, where *γνώσι* is rendered "shall declare" and *διαγιγνώσκειν* "decide." Sandys' view, quoted *supra*, p. 272, n. 2, would also explain the number in this case.

<sup>1</sup> *Supra*, pp. 99 ff.

<sup>2</sup> The function of the ephetae is in this case primarily religious, i.e., the granting of *aĩδεσις*. There is no objection to assuming that in this particular instance the ephetae continued to be drawn from the Areopagus.

<sup>3</sup> Andocides 1. 78: *πλήν ὅποσα ἐν στήλαις γέγραπται τῶν μὴ ἐνθάδε μεινάντων, ἢ ἐξ Ἀρείου πάγου ἢ τῶν ἐφετῶν ἢ ἐκ πρυτανείου ἐδικάσθη ὑπὸ τῶν βασιλέων, ἢ ἐπὶ φόνοῃ τίς ἐστι φυγὴ ἢ θάνατος κατεγνώσθη ἢ σφαγεῦσιν ἢ τυράννοις*. For the text here given, cf. *supra*, p. 105. Lipsius, *op. cit.*, p. 40, uses this law to prove that the change came during the archonship of Euclides. The MS reads *ἢ Δελφινίου* after *πρυτανείου*; and Keil (*Die Solonische Verfassung*, p. 111) has accepted this as proof that the Delphinion was already manned by heliastic jurors. But as has been shown, *supra*, p. 105, the phrase is merely a gloss.

phinium, and in Phreatto, now manned by heliastic jurors.

Confirmation of the view that the reorganization of the ephetic courts had been made prior to 409-408 is afforded by a speech of Antiphon. The *Choreutes* at least was delivered before the Palladium.<sup>1</sup> In this speech there are two forms of address to the jury: ὦ ἄνδρες δικάσται<sup>2</sup> and ὦ ἄνδρες.<sup>3</sup> It is quite improbable that such a form of address as ὦ ἄνδρες δικάσται would have been used of any except heliastic jurors.<sup>4</sup> There is some doubt whether the first oration was delivered before the Areopagus or the Palladium.<sup>5</sup> The forms of address ὦ ἄνδρες and ὦ δικάζοντες might, with propriety, have been used in any court. But the words τοῦτου γε ἔνεκα καὶ δικάσται ἐγένεσθε καὶ ἐκλήθητε<sup>6</sup> do not describe the Areopagites, who became judges, not by choice or selection, but automatically, because they were ex-archons with a good official record. The description is, however, well suited to describe a panel which officially retained the name ἐφέται, though its members were recruited from the ranks of the δικάσται. These speeches, delivered prior to 411 B.C., afford the earliest evidence for heliastic jurors in the ephetic courts. The manning of the heliastic courts by δικάσται belongs to some constitutional reform prior to this date. It is most natural to connect it with the reform of the Areopagus and especially with the final measures of Pericles.<sup>7</sup>

<sup>1</sup> Lipsius, *op. cit.*, p. 918, n. 66; Blass, *Attische Beredsamkeit*, I, 195. Blass (*ibid.*, I, 187-88) contends that the *Stepmother* case also was tried before the Palladium, but Lipsius (*op. cit.*, p. 126) assigns it to the Areopagus.

<sup>2</sup> vi. 1.

<sup>3</sup> vi. 7, 16, 20, etc.

<sup>4</sup> Cf. Blass, *op. cit.*, p. 195, who asserts that the *Choreutes* trial took place in the Palladium before heliastic jurors.

<sup>5</sup> For the arguments pro and con, cf. Lipsius, *op. cit.*, p. 124, n. 10; p. 126, n. 16; Blass, *op. cit.*, I, 187 f.; and Gernet, *Antiphon* (Budé edition), introduction to the first oration.

<sup>6</sup> Antiphon i. 23.

<sup>7</sup> Gernet (review of Gertrude Smith, "The Dicasts in the Ephetic Courts," *Class. Phil.*, XIX, 353 ff., in *Rev. des études grecques*, XXXIX, 464) regards as attractive, but not convincing, the theory that the substitution of heliastic jurors for ephetae belongs to the reforms of Pericles. He questions the evidence cited to show that the designation ἐφέται survived down into the fourth century long after the minor homicide courts were manned by δικάσται. He objects to the citation of

Despite the Areopagus' loss of power occasioned by the reforms of Ephialtes and Pericles, the body never lost its remarkable prestige, and never seems to have become a really unimportant council. This is proved by the numerous cases in which it suddenly exhibited its power again. On more than one occasion the people entrusted it with a special task or commission of inquiry. Examples of this are as follows:

In the alarm resulting from the disaster at Aegospotami the Areopagus was engaged in finding some means of safety for the state: *πραττούσης μὲν τῆς ἐν Ἀρείῳ πάγῳ βουλῆς σωτήρια*.<sup>1</sup> This is reminiscent of the prominence acquired by the council immediately after the Persian wars; but its influence and powers can hardly have been so extensive as at that time, when, if our authorities are to be believed,<sup>2</sup> they amounted virtually to a dictatorship. The powers of the council after Aegospotami are comparable to the extraordinary powers which it assumed after the Battle of Chaeronea.<sup>3</sup> But just what its powers included at this time it is difficult to say. It joined the opposition to Theramenes' request for unlimited power<sup>4</sup> and must have been chiefly concerned with attempting to keep the democracy on the old basis and fortified against a recurrence of the events of 411 B.C. This authority was probably vested in the Areopagus as a special commission. It is only natural that at a period of disturbance and disaster the state should look for assistance to the council which had always had prestige and had always proved itself both helpful and trustworthy. The Areopagus by this time must very largely have lost its highly aristocratic character, and was hardly to be feared on that account. It was recognized as a body which upheld the democracy and gave fair judgments.

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Demosthenes' use of "ephetae" (xxiii, 38) because he is virtually quoting from a section of the Draconian code. But the very fact that the word was still in the code in the time of Demosthenes proves the contention that the word continued to be used after the courts were manned by dicasts. The differentiation between "ephetae," and "51 ephetae" in the code, as has been pointed out above, shows that the change had already been sufficiently recognized in the revision of 409-408.

<sup>1</sup> Lysias xii. 69. Cf. Frohberger, *ad loc.*

<sup>2</sup> Aristotle *Ath. Pol.* xxiii. 1. Cf. *supra*, p. 251.

<sup>3</sup> Cf. *infra*, p. 365.

<sup>4</sup> Lysias xii. 69. Cf. Philippi, *op. cit.* p. 184.

Such instances as this render it probable that there were many occasions on which the council was intrusted with some particular task, and that during a specified period it might have considerable power, although its regular duties had been so much curtailed by the reforms of Ephialtes and Pericles.<sup>1</sup>

When the Thirty had become established in power, one of their first measures was to remove from the Areopagus the laws of Ephialtes regarding the council. This amounted virtually to a repeal of these laws and would mean that the prerogatives were restored to the Areopagus of which it had been deprived by Ephialtes. This was in pursuance of the policy which the Thirty adopted at first of ruling according to the ancient constitution.<sup>2</sup> Their purpose evidently was to curry favor with the people by destroying some of the abuses of the very extreme democracy. The Thirty were anxious to weaken the popular courts. Hence it is natural that they should assign to the Areopagus in its character of *φύλαξ τῆς πολιτείας* some of the most fruitful sources of litigation, e.g., *δοκιμασία, εὐθυνα, γραφή παρανόμων*.<sup>3</sup> In addition the Areopagites may have recovered for this period the right to sit as *ἐφέται* in the minor homicide courts, although it is difficult to say whether the Areopagus functioned at all as a homicide court after the reign of terror began. But it probably was not suspended.<sup>4</sup>

The restored democracy, after the Thirty, gave the Areopagus oversight of the laws by the decree of Teisamenus: *ἐπιμελείσθω ἡ βουλή ἡ ἐξ Ἀρείου πάγου τῶν νόμων, ὅπως ἂν αἱ ἀρχαὶ τοῖς κειμένοις νόμοις χρῶνται*.<sup>5</sup> Caillemer contends that it is not likely that such power should be restored to an essentially aristocratic body. This fact, together with the absence of

<sup>1</sup> The amnesty law of this period (Andocides i. 78), which is practically a re-statement of the Solonian law, mentions the Areopagus' jurisdiction in homicide cases and in cases of attacks on the government. Cf. *supra*, pp. 104 ff.

<sup>2</sup> Aristotle, *op. cit.*, xxxv. 2 (cf. Sandys, *ad loc.*).

<sup>3</sup> Cf. *infra*, p. 331.

<sup>4</sup> For a detailed discussion of the position of the Areopagus under the Thirty, cf. *infra*, pp. 328 ff.

<sup>5</sup> Andocides i. 84.

any reference to such authority in fourth-century history, has led him to question the authenticity of the decree.<sup>1</sup> His objection does not, however, seem wholly tenable. The Areopagus assumed considerable importance again apparently at the end of the fifth century, and it is not strange that its ancient prerogative of νομοφυλακία should be in some measure restored to it. It is interesting to see how this body, whose reliability and justness were constantly recognized, was used both by the oligarchs and by the restored democracy.<sup>2</sup>

<sup>1</sup> *Op. cit.*, p. 402; cf. Thalheim in Pauly-Wissowa, II. 631.

<sup>2</sup> For the prestige and activities of the Areopagus in the fourth century, cf. *infra*, pp. 362 ff.

## CHAPTER IX

### JUDICIAL FUNCTIONS OF THE MAGISTRATES

The organization of the heliastic courts as primary tribunals reduced very materially the judicial functions of the magistrates. In common with purely administrative officials they retained the right to impose a small fine upon anyone who interfered with the performance of their administrative or judicial functions by disobedience or opposition. In the case of the *hieropoioi*, and the *proedroi* of the *boulé*, 50 drachmas are mentioned as the limit (τὸ τέλος) of this summary fine (ἐπιβολή).<sup>1</sup> It could scarcely have been less for the others. In the case of the demarchs these fines had to be confirmed by the judgment of a court.<sup>2</sup> This circumstance and the statement of a client of Lysias have led some to conclude that this was true of all officials. But it is distinctly said that in the case of the archon court action was necessary only if the fine exceeded the legal limit.<sup>3</sup> There is some doubt as to whether the person who was fined within the legal limit had the right of appeal. The leading case on the question is the speech for the soldier Polyænus<sup>4</sup> attributed to Lysias. He had been fined by the generals summarily for slander. For some reason he failed to pay the fine, and the present suit resulted. The defendant seems to rest his case primarily upon the allegation that the treasurers remitted the fine. The responsibility, if any, was theirs.<sup>5</sup> But he reverts to the origi-

<sup>1</sup> Lipsius, *Das Attische Recht*, p. 54, n. 3; Thalheim in Pauly-Wissowa, s.v. ἐπιβολή.

<sup>2</sup> *CIA*, ii. 573b: ἐψηφίσθαι Πειραιεύσιν ἕαν τις τι τούτων παρὰ ταῦτα ποιῇ, ἐπιβολὴν ἐπιβαλόντα τὸν δῆμαρχον εἰσάγειν εἰς τὸ δικαστήριον χρώμενον τοῖς νόμοις οἱ κεύνται περὶ τούτων.

<sup>3</sup> Demosthenes xliii. 75: ἕαν δέ τις ὑβρίζῃ ἢ ποιῇ τι παράνομον κύριος ἔστω (ὁ ἄρχων) ἐπιβάλλειν κατὰ τὸ τέλος. ἕαν δὲ μείζονος ζημίας δοκῇ ἄξιος εἶναι προσκαλεσάμενος πρόπεμπτα καὶ τίμημα ἐπιγραψάμενος ὅτι ἂν δοκῇ αὐτῷ εἰσαγαγέτω εἰς τὴν ἡλιαίαν.

<sup>4</sup> ix.

<sup>5</sup> *Ibid.*, 7. That the treasurers had no authority to remit the fine is clear. They did it at their own risk: τὸν παρ' ὑμῶν κίνδυνον ὑποστάντες ἀκυροῦν τὴν ζημίαν ἔκριναν.



nal cause of the fine. The law of Solon forbade slander of an official in a public office. Polyaeus' remarks, however, were made not in a public office but in a bank, and were reported to the generals who fined him but made no attempt to collect the fine; neither did they take steps to make it legal by vote of a court.<sup>1</sup>

Polyaeus did not appeal the case. This is certain.<sup>2</sup> But he clearly implies that the generals were under some obligation to bring the matter into court.<sup>3</sup> There is no claim that the fine was beyond the competence of the generals and needed to be confirmed by a heliastic court. It has been suggested that, when a person fined by a magistrate refused to pay, the magistrate must take the case into court.<sup>4</sup> In effect this would constitute an appeal, though the initiative lay with the magistrate. This suggestion has met with general approval, and an attempt has been made to find further support for it in a passage of Aristophanes which is as follows:

BD: Well, but if these are really your delights,  
Yet why go *There* [i.e. to court]? Why not remain at home  
And sit and judge among your household here?

PH: Folly! Judge what?

BD: The same as *There* you do.  
Suppose you catch your housemaid on the sly  
Opening the door: fine her for that, one drachma.  
That's what you did at every sitting *There*.<sup>5</sup>

<sup>1</sup> *Ibid.*, 6: ἐπιβαλόντες δὲ τὸ ἀργύριον πράξασθαι μὲν οὐκ ἐπεχείρησαν. *Ibid.*, 11: οὔτε γὰρ εὐθύνas ὑπέσχον οὔτε εἰς δικαστήριον εἰσελθόντες τὰ πραχθέντα κύρια κατέστησαν.

<sup>2</sup> Siegfried, *De multa quae ἐπιβολή dicitur*, p. 50; Pabst, *De oratione Lysiacae "Pro milite"*, p. 14.

<sup>3</sup> Compare passages quoted in note 1 above.

<sup>4</sup> Lipsius, *op. cit.*, pp. 53-54. Siegfried (*op. cit.*, p. 51) believes there was no appeal. Thalheim (*op. cit.*), contrary to general opinion, is inclined to agree with him, but for different reasons. The words ἐξ ἐπιβολῆς εἰσαχθεὶς εἰς τὸ δικαστήριον in Lysias vi. 21 may refer to an attempt of the magistrate to collect a fine within his official competence. Siegfried (*op. cit.*, p. 53) thinks the reference is to a fine beyond the magistrate's competence. The point is arguable.

<sup>5</sup> *Wasps*, 764 ff. Roger's translation.

BD. σὺ δ' οὖν, ἐπειδὴ τοῦτο κεχάρηκας ποιῶν  
ἐκέῖσε μὲν μηκέτι βάδιζ', ἀλλ' ἐνθάδε  
αὐτοῦ μένων δικάζε τοῖσιν οἰκέταις,

[Footnote continued on following page]

Here the heliastic jury in the person of Philocleon is to vote on the question of a fine on the housemaid. The word ἐπιβολή is regarded as being used in its technical sense of the summary fine of a magistrate. Someone in authority over the servants, or, better still, Bdelycleon, who represents in his own person the thesmothetae who preside at the trial, has exercised his magisterial authority and inflicted a trivial fine upon her. She in turn appeals and the court is to confirm it. On the basis of a single word, ἐπιβολή, the audience is supposed to imagine all this and then to laugh. At what? Siegfried<sup>1</sup> believes that the joke lies in the fact that so small an ἐπιβολή could not be appealed. This explanation does not fit in with the statements to the effect that in inflicting this ἐπιβολή he will be doing just what he did from time to time in court.

πάντως δὲ κάκει ταῦτ' ἔδρας ἐκάστοτε.<sup>2</sup>

Surely appeals from magistrates' fines were not typical court cases. Furthermore, the matter thus conceived is much too complicated for even an Athenian audience to catch in passing. A simpler interpretation is offered by the scholiast. ἐπιβολή is used like ζημία in the sense of "fine" imposed by a court.<sup>3</sup> Starkie accounts for the choice of the word by pointing out that it may be used in *sensu obsceno*.<sup>4</sup> This is quite in the Aristophanic manner. Apparently whenever a woman appears or is mentioned, a *double entente* was expected.

But even if there was no provision for appeal from a magistrate's fine, the person who felt that he was wrongfully fined by a magistrate still had a remedy in the εὔθυνα, where he could call attention to the arbitrary conduct of the magistrate and eventually bring the matter before a heliastic court. A favorable verdict would result in a remission of the fine.

ΦΙ.

περὶ τοῦ; τί ληρεῖς; ΒΔ. ταῦθ', ὅπερ ἐκεῖ πράττεται  
ὅτι τὴν θύραν ἀνέφξεν ἡ σηνίς λάθρα,  
ταύτης ἐπιβολὴν ψηφιεῖ μίαν μόνην,  
πάντως δὲ κάκει ταῦτ' ἔδρας ἐκάστοτε.

<sup>1</sup> *Op. cit.*, p. 54.

<sup>2</sup> *Wasps*, 770.

<sup>3</sup> Scholiast on *Wasps*, 764.

<sup>4</sup> *Wasps of Aristophanes*, note on line 769. Van Leeuwen takes the same point of view and cites *Acharnians*, 275, and *Birds*, 1215.

It was apparently to escape this possibility of attack that the generals in Lysias' ninth oration failed to enter the fine imposed on the soldier in the accounts which they submitted to the auditors. Refusal to pay the fine would in the end have the same effect as an appeal.

A remnant of the ancient right of magistrates to pass final judgment on all cases within their jurisdiction is the right possessed by some magistrates and boards to settle, on their own authority, cases involving 10 drachmas or less. In the opinion of some scholars, all magistrates and judicial officials and boards enjoyed this prerogative.<sup>1</sup> Aristotle<sup>2</sup> mentions it only in the case of the Forty and the Receivers-general (*ἀποδέκται*). Aristotle's account of the judicial functions of the magistrates is not exhaustive; others may have possessed similar powers. But it is to be observed that the Forty and the Receivers-general dealt mainly with cases in which specific sums of money were in dispute. Therefore, it would be possible at once to classify a case as above or below 10 drachmas. In the cases that came before other magistrates, involving damages, fines, and other penalties, it would be difficult, if not impossible, to classify them, before trial, as above or below 10 drachmas, even where the pains and penalties were estimated in money. This may be the reason why only the Forty and the Receivers-General had the privilege of final jurisdiction. But, apart from the inherent improbability that all magistrates possessed the right of giving final judgment in trivial cases, a passage in the *Wasps*,<sup>3</sup> already quoted and discussed, seems to afford proof that trivial cases did come before a court. Bdelycleon proposes that his father hold domestic court and punish the servants for crimes and misdemeanors. He suggests that a housemaid be fined a drachma for a trivial offense. We need not stop to inquire what magistrate would deal with this type of case. It may be imagined as coming under the jurisdiction of the thesmothetae. But be that as it may, it would not fall under the jurisdiction of the Forty or the Receivers-

<sup>1</sup> Lipsius, *op. cit.*, p. 53.

<sup>2</sup> *Ath. Pol.* liii. 1; lii. 3.

<sup>3</sup> Cf. *supra*, p. 280.

general. The words πάντως δὲ κάκει ταῦτ' ἔδρας ἐκάστοτε show that fines less than 10 drachmas were inflicted by the courts. This could not very well have been the case if all magistrates and boards could assess damages and impose fines of 10 drachmas or less on their own authority. On the basis of available data it is not safe to conclude that any magistrates except the Forty and the Receivers-general enjoyed this limited right of independent jurisdiction as distinct from their right to impose a summary fine (ἐπιβολή) for disobedience or contumacy.

The *anakrisis* is a survival of the pre-Solonian trial before a single judge who was empowered to render a final verdict. Naturally all the evidence was presented. The appeal allowed by Solon did not alter the situation in regard to the evidence. All available proof had to be produced, for the magistrate was still required to render a verdict on the merits of the case. But when the task of magistrates, judicial officers, and boards was simply to bring the case into court and to preside at the trial, the situation with regard to evidence was materially altered.

Current misconceptions regarding the basis on which evidence continued to be produced at the *anakrisis* are due in part to the belief that evidence had, from the first, been presented in written form, and in part to the failure to distinguish between the process of arbitration and the *anakrisis*. It is now well understood that for a century testimonial evidence in the heliastic courts was presented orally.<sup>1</sup> And investigation since the discovery of Aristotle's *Constitution of*

<sup>1</sup> Bonner, *Evidence in Athenian Courts* (1905), pp. 54 ff. Cf. Leisi, *Der Zeuge im attischen Recht* (1908), p. 85, n. 2. Lipsius' (*op. cit.*, p. 883, n. 65) claim, with reference to this discovery, that "Das wurde bereits *Att. Proc.* 2 S. 495. A. 55 festgestellt, aber die volle Konsequenz haben daraus mit Heranziehung des positiven Faktors erst Bonner und Leisi gezogen," is quite unwarranted. All that Lipsius did was to establish the fact that witnesses were always present in court. But there is nothing to show that he ever thought of oral evidence. The words "die älteren Gerichtsreder die Verlesung der Zeugnisse ausschliesslich durch solche Formeln einleiten" show that he believed that evidence was always read. There is no justification for associating Bonner and Leisi. Bonner's book appeared in 1905. Leisi was familiar with it and cites it in his book published in 1908. Evidence continued to be presented orally in the homicide courts (Bonner, *Class. Phil.*, VII (1912), 451 ff.). Cf. Lipsius, *op. cit.*, p. 838.

*Athens* has shown that his description of arbitration cannot be transferred to the *anakrisis*.<sup>1</sup> Nevertheless, the effects of these earlier misconceptions have not altogether disappeared. Lipsius, in *Das attische Recht*,<sup>2</sup> in the beginning of the chapter on the *anakrisis*, says: "Diese Vorprüfung, bei der die Parteien alle zur Unterstützung ihrer Sache dienlichen Erklärungen abzugeben und ihre Beweise vorzulegen hatten, heist ἀνάκρισις." From this sentence the reader naturally infers that litigants were under obligation to produce *all* their evidence at the preliminary inquiry. And yet a little farther on in the chapter he admits: "Andererseits lässt sich nicht erweisen, dass in der Anakrisis schon das Beweismaterial in vollem Umfang beigebracht werden musste."

Comparatively little information regarding evidence in the *anakrisis* is to be found in the sources. The subject is rarely mentioned in connection with the *anakrisis*. There is nowhere any indication in the sources that the evidence in a case must be produced at the *anakrisis*. On the contrary, there are plenty of data in the orators to show that it was neither impossible nor exceptional to produce evidence for the first time on the day of trial. A common example of what may be called "new" evidence (i.e., evidence not produced at the *anakrisis*) is a deposition produced in court, for a witness to acknowledge or reject under oath, by a litigant who did not know whether this witness could or would give testimony. If the witness appears and accepts, the deposition is read to the jurors.<sup>3</sup> If he refuses to testify, he takes an oath in disclaimer. Even if, as Kennedy assumes,<sup>4</sup> the deposition was filed at the *anakrisis*, it was in no sense evidence until it was acknowledged by the proposed witness.

The records of litigation during the period in which oral evidence was presented are scanty. But Plutarch<sup>5</sup> has preserved an instructive incident in a trial in which Aristides appeared as an impromptu witness. His cousin Callias was

<sup>1</sup> Bonner, *Evidence in Athenian Courts*, p. 48. Cf. Lipsius, *op. cit.*, p. 838.

<sup>2</sup> Pages 829 (cf. p. 54) and 838.

<sup>3</sup> Bonner, *Evidence in Athenian Courts*, p. 51.

<sup>4</sup> Smith, *Dictionary of Antiquities*, s.v. "Martyria."

<sup>5</sup> *Aristides*, xxv.

being tried on a capital charge. The prosecutors, going beyond the scope of the indictment, sought to prejudice the jurors by accusing Callias, a rich man, of refusing to relieve the manifest necessities of his kinsman, the distinguished Aristides. Callias, observing the adverse effect of this charge upon the temper of the jurors, summoned Aristides and asked him to testify. Aristides complied and gave evidence that he had constantly refused to accept financial assistance from Callias. A dramatic example of the production of evidence for the first time at the trial is found in Isocrates' speech against Callimachus.<sup>1</sup> A brother-in-law of Callimachus had a quarrel with one Cratinus, during which they came to blows. In the course of the fight a female slave was injured. The woman was concealed, and a story, to the effect that she had died as the result of a blow inflicted by Cratinus, was circulated. An indictment for manslaughter was laid. The king archon conducted the three required preliminary examinations which in homicide cases were called *προδικασίαι*. Eventually the case came to trial. Cratinus, however, having become aware of the plot, had succeeded in locating the woman; but, desiring to catch the plotters *ἐπ' αὐτοφώρῳ*, he kept his discovery secret until the day of the trial, when he produced her alive and well to the utter confusion of the prosecutor, who had produced fourteen witnesses to prove that she was dead. These cases show clearly that a litigant was under no obligation to produce his evidence at the preliminary hearings. Had the defendant in the Callimachus case produced his evidence at the preliminary hearing, there would have been no trial.

In addition to these specific instances of evidence that was not produced at the *anakrasis*, there are a number of instances where a litigant challenges his opponent to produce evidence to refute him or to prove a particular assertion. Socrates was not content to draw attention to the failure of the prosecutors to produce relatives of any of the young men he was alleged to have corrupted. He challenged them to produce, then and there, some of them in the time al-

<sup>1</sup> xviii. 52-54.

lotted to him for his own defense.<sup>1</sup> There are many such challenges in the orators to produce various kinds of evidence. It does not help matters to dismiss these as mere rhetoric. It is true that no one expected a litigant to respond to such a challenge. But Socrates was not proposing to his prosecutors something they were not permitted by law to do, viz., to produce in court evidence that had not been produced at the *anakrisis*. The permission which Socrates granted to his opponents to produce witnesses at that stage of the trial was necessary because his allowance of time would thereby have been curtailed.

The frequently recurring phrases, such as "I hear," or "I am told that my opponent will say thus and so," are not always mere rhetorical devices of speech-writers to meet their opponents' arguments in advance. Unquestionably the proceedings of the *anakrisis* often left a litigant in doubt as to his opponent's line of defense or attack. This could not very well have happened if the opponent had so far developed his plan of treatment as to produce all his evidence at the *anakrisis*. More tangible proof that evidence not known to a litigant could be produced at the trial by his opponent are such statements as the following: "And so if he takes refuge in this argument and produces witnesses to prove that Aristarchus made a will, etc.";<sup>2</sup> "If they declare that Dicaeogenes left this property and that we have recovered it, let them produce a witness to support their statement."<sup>3</sup> These and other similar examples show clearly that there was no restriction on producing evidence for the first time at the trial. Even rhetoric would not venture to suggest the possibility of something's being done which the law did not permit. A speaker who pursued such tactics before men who knew the law as did the Athenian jurors would assuredly sooner or later come to grief.

<sup>1</sup> Plato, *Apology of Socrates*, 33d.

<sup>2</sup> Isacus x. 23. Cf. Bonner, *Evidence in Athenian Courts*, p. 52.

<sup>3</sup> Isacus v. 4. Cf. ix. 9. Cf. Isocrates xvii. 38. Lipsius (*op. cit.*, p. 839, n. 35) denies, without explanation or argument, that "eine Unkenntnis der Beweismittel des Gegners folgt aus der hypothetischen Fassung von Isacus" (x. 23).

It is clear that a litigant did not always have his own case well in hand after going through the *anakrisis*. A case in point is found in the Demosthenic corpus. The plaintiff in *Callistratus v. Olympiodorus*,<sup>1</sup> in giving an account of some earlier litigation in which he and the defendant had pooled their claims to an estate, says that after the *anakrisis* he and Olympiodorus found themselves utterly unprepared to go to court at once on account of the large number of claimants that suddenly appeared against them.

καὶ ἐπειδὴ ἀνεκρίθησαν πρὸς τῷ ἄρχοντι ἅπασαι αἱ ἀμφισβητήσεις καὶ ἔδει ἀγωνίζεσθαι ἐν τῷ δικαστηρίῳ ἀπαράσκευοι ἡμεν τὸ παράπαν πρὸς τὸ ἤδη ἀγωνίζεσθαι . . . διὰ τὸ ἐξαίφνης ἐπιτεπτικῆναι ἡμῖν πολλοὺς τοὺς ἀμφισβητοῦντας.

So difficult was their position that they cast about for some excuse for securing a continuance of the case. They failed and lost their case by default. If all the witnesses in the case had been secured and their evidence reduced to writing, it would seem that the preparation of a speech would have been a comparatively simple matter, if that was all they had to do. It is probable, however, that the difficulty was due to unexpected claimants that appeared. They needed time to revise their plans to deal with the unexpected conditions that faced them. To meet these, they would require additional witnesses, whose depositions would appear for the first time at the trial. The situation disclosed by the various possibilities of new evidence at this trial seems to be quite incompatible with a rule requiring *all* evidence to be produced at the *anakrisis*.

Before a public arbitrator the case was different. All evidence had to be produced because, if he failed to induce the parties to agree to a compromise, the arbitrator rendered a verdict on the merits of the case. If there was an appeal, the evidence was inclosed and sealed in a receptacle known as an *ἐχίνος*. This was a reasonable requirement, as appeals are regularly based upon the original evidence in the case. But there is no justification for handling evidence in non-

<sup>1</sup> xlvi. 23. Cf. Bonner, *Evidence in Athenian Courts*, p. 50, and Leisi, *op. cit.*, p. 83.



arbitration cases in the same way. And yet the source of current misconceptions regarding the nature and purpose of the *anakrisis* has been the failure to distinguish clearly, as Aristotle does, between *anakrisis* and arbitration. Thalheim, for example, in his article on *anakrisis*<sup>1</sup> simply substituted *ἀνάκρισις* for *δίαίτα* and copied Aristotle's description of arbitration. The confusion appears in the lexicographers. Harpocration defined *ἐχῖνος* as follows: *ἔστι μὲν ἄγγος τι εἰς ὃ τὰ γραμματεῖα τὰ πρὸς τὰς δίκας ἐτίθεντο· Δημοσθένης ἐν τῷ πρὸς Τιμόθεον. μνημονεύει τοῦ ἄγγους τούτου καὶ Ἀριστοτέλης ἐν τῇ Ἀθηναίων πολιτείᾳ.*<sup>2</sup> Suidas practically repeats this definition. The reference to Aristotle as their authority shows that they have transferred the procedure of arbitration to the *anakrisis*. The error has within recent years been exposed. It has been satisfactorily shown that in the orators there is no mention of *ἐχῖνος* except in connection with arbitration.<sup>3</sup>

There is a fundamental difference between evidence in an Athenian court and evidence in Anglo-American courts. An Athenian litigant himself presented to the court all the facts that supported his claim. Witnesses were called at intervals merely to corroborate his statements. This is shown by such expressions as: *καὶ ὡς ἀληθῆ λέγω, ἀναγίγνωσκε τὴν μαρτυρίαν, τούτων δ' ὑμῖν μάρτυρας παρέξομαι.* In a modern court the jury gets all the facts from the witnesses. A careful perusal of the evidence offered would acquaint the reader with the facts in the case. But so far as we can judge, the reading of the testimony presented to an Athenian court would, as a rule, furnish a very meager notion of the details of the matter in dispute. Many unattested facts are to be found in the speeches of both principals and advocates. It is important to keep this situation in mind in attempting to reconstruct the proceedings of the *anakrisis* so far as the presentation of evidence is concerned, particularly during the period when all testimonial evidence was oral. The in-

<sup>1</sup> Pauly-Wissowa, *s.v.* ἀνάκρισις.

<sup>2</sup> It is implied that all documentary material, whether in arbitration or at the *anakrisis*, was inclosed in an *ἐχῖνος*.

<sup>3</sup> Bonner, *Evidence in Athenian Courts*, p. 48. Cf. Lipsius, *op. cit.*, p. 838, n. 34.

terrogations and stories of witnesses would be mere *disjecta membra* apart from a more or less formal presentation of his claims by the litigant. A litigant who purchased his speech would fare rather badly if he was required to present his whole case at this stage of the trial. And why should a magistrate be required to listen to all the evidence? He does not appear to have had any authority to exclude testimony that contravened the laws. His opinion on the merits of the dispute played no part in the trial. And the evidence must all be repeated for the benefit of the jury. An *anakrisis* conducted in this fashion would be a mere dress rehearsal of the trial.

The Athenian magistrate did have a limited, but very necessary, judicial function to perform. He had to decide whether the case was admissible (*εἰσαγωγίμους*).<sup>1</sup> This inquiry involved such questions as the following: Was the plaintiff eligible to appear in court? Was the defendant qualified to answer the charge or the claim? If the defendant failed to appear, had he been duly summoned? Were the documents—plaint or indictment—properly drawn? Was the matter at issue actionable? Was the proper form of action chosen? Did the magistrate have jurisdiction in the case? Was the action brought at the proper time according to law? Was the matter *res judicata*? In regard to some of the questions, the answers of the parties in the presence of each other would be sufficient. The magistrate must have had the right to refuse to believe an unconfirmed statement. This attitude would be tantamount to requiring parole or documentary evidence. But such evidence would be required for the purposes of the *anakrisis* and might not be produced at the trial at all. Such evidence would be for the magistrate to enable him to decide whether the case was admissible. The jury would normally have no concern with this phase of the case. It was settled in the *anakrisis*.

The word *ἀνάκρισις* shows that the basis of the magistrate's judgment consisted in the answers of the litigants to his questions. In homicide cases the preliminary inquiry

<sup>1</sup> Caillemer, *Anakrisis*, Daremberg and Saglio, I, 262. Cf. Leisi, *op. cit.*, p. 84.

was called *προδικασία*. Here the emphasis is laid on the purpose of the inquiry rather than on the method of conducting it. Whether the litigant called witnesses to corroborate his answers to the magistrate would depend on a number of considerations. But the essential point is that the decision lay entirely with the litigant himself. This is reasonable. He was not required to corroborate his statements at the trial; why should he be required to do so at the *anakrasis*?

The records of Athenian litigation have preserved only one picture of proceedings at an *anakrasis*. It is far from being as complete as we might desire, but it does yield some information of value.

When the hearings [*ἀνακρίσεις*] took place before the archon, and my opponents paid money into court in support of their claim that these young men were the legitimate sons of Euctemon, on being asked by us who, and whose daughter, their mother was, they could not supply the information, although we protested and the archon ordered them to reply in accordance with the law.<sup>1</sup>

At that time they claimed that she was a Lemnian, and secured a continuance. The reason for the adjournment is not given. Obviously they asked delay to obtain necessary information from Lemnus. But when the hearing was resumed, they changed their story and said the mother was Calliope, daughter of Pistoxenus, thus answering the question, "Who, and whose daughter their mother was." The speaker pressed for proof of this statement either in the form of evidence of relatives or answers of slaves put to the question. But no evidence was produced. Commenting on this refusal to furnish proof of statements at the *anakrasis*, the speaker gravely remarks in the best Isaean manner: τὰ γὰρ τοιαῦτα οὐκ εἰς τὴν ἀνάκρισιν μόνον δεῖ πορίζεσθαι [δυνάματα], ἀλλὰ τῇ ἀληθείᾳ γεγονότα φαίνεσθαι καὶ ὑπὸ τῶν προσηκόντων καταμαρτυρεῖσθαι.<sup>2</sup> These words do not mean that there was a law requiring statements made at the *anakrasis* to be confirmed by evidence. They simply mean that such statements cannot be believed without some sort of proof. This account of an *anakrasis* shows quite clearly that it was optional with

<sup>1</sup> Isaeus vi. 12, translated by Forster ("Loeb Library").

<sup>2</sup> *Ibid.*, 15.

litigants whether they produced evidence at the preliminary hearings of a case. To the same effect is a passage near the end of the speech:

Let Androcles, therefore, prove that the children are legitimate, as anyone of you would do under similar circumstances. His mere mention of a mother's name does not suffice to make them legitimate, but he must prove that he is speaking the truth by producing the relatives who know that she was married to Euctemon.<sup>1</sup>

In the strategy of litigation it is of the utmost importance to discover in advance an opponent's proposed line of attack or defense. No better source of information on this point could be devised than an *anakrasis* at which the litigant was obliged to disclose his whole case by producing all his evidence. An intelligent litigant familiar with the case from his own standpoint would obtain most valuable hints and information from perusing or hearing the evidence offered by his opponent. It is to be expected that, in the more or less informal proceedings of the *anakrasis* where opponents were permitted to question each other, like Isaeus' client, they should in their own interest try to induce an opponent to make disclosures useful to them, by producing his evidence. And yet there is no indication that a litigant ever discovered anything at the *anakrasis* regarding his opponent's proposed plan of conducting his case. Occasionally the proceedings in arbitration, where all the evidence was produced, are mentioned as a source of information on this point, but the *anakrasis* is never mentioned in this connection. This cannot be a matter of accident. It indeed goes a long way toward showing that the evidence in a case was not produced at the *anakrasis*.

A change in the method of handling evidence followed the enactment of the law requiring written depositions instead of oral statements.<sup>2</sup> Testimonial evidence, like other documents in the case, was read by the clerk of the court when called for by the speaker. For this purpose evidence must have been filed as a rule before the beginning of the trial. There were some exceptions. Witnesses occasionally

<sup>1</sup> *Ibid.*, 64.

<sup>2</sup> For the date of the law (378-377 B.C.), cf. *infra*, p. 357.

were unwilling to testify for various reasons. At the trial such witnesses were summoned to appear and subscribe to a deposition prepared for them or to take an oath in disclaimer. Such documents, alternative depositions or disclaimers, could not in any real sense be regarded as part of the record of the case. They could be handed to the clerk at any time. Sometimes new facts that bore on the case were brought to light. These of course could be brought to the attention of the jury and confirmed by evidence. An example is found in *Apollodorus v. Arethusius*,<sup>1</sup> a criminal prosecution for false witness to a writ of summons (*ψευδοκλητεία*). After the conclusion of the *anakrisis* Apollodorus was viciously assaulted by the defendant one night as he was returning to the city from the Piraeus. Within a few days the case came to trial. Owing to this assault and other aggravating circumstances, the jury showed a disposition to inflict the death penalty. Undoubtedly Apollodorus produced as witnesses those who, in answer to his cries, came to the rescue. Otherwise the jury would scarcely have proposed to inflict so severe a penalty.

Thalheim,<sup>2</sup> having this situation in mind, proposed to include in the proceedings of the *anakrisis* not only the more or less formal meetings of the magistrate with the litigants but also the appearances of the litigants at the office of the magistrate at any time before the trial, for the purpose of filing documents, including depositions. There are objections to this proposal. In the case of *Apollodorus v. Arethusius*<sup>3</sup> it is distinctly said that the *anakrisis* was concluded when the assault complained of took place. Evidently the plaintiff did not regard the submission of further evidence in the case as a reopening of the preliminary hearing.

The *anakrisis* was, as the name implies, an informal interrogation of the parties by the magistrate to enable him to determine whether he should accept the case. It was in

<sup>1</sup> Demosthenes liii. 17-18.

<sup>2</sup> *Berliner Philologische Wochenschrift*, 1905, p. 1575.

<sup>3</sup> Demosthenes liii. 17. ἀνακεκριμένου γὰρ ἤδη μου κατ' αὐτοῦ τὴν τῆς ψευδοκλητείας γραφὴν καὶ μέλλοντος εἰσέναι εἰς τὸ δικάστηριον κ.τ.λ. A vivid account of the assault follows.

no sense an examination for discovery in the interest of the parties. But the proceedings were open to both parties. Neither of them need be ignorant of the contents of any document or the purport of any deposition produced for the purposes of the *anakrisis*. And yet, on several occasions the words of a litigant seem to imply quite plainly the possibility of a deposition's being filed without his knowledge. Now, it is submitted that the filing of a deposition under circumstances which rendered it impossible for a litigant, with the exercise of due diligence, to be aware of the fact before the document was read in court, cannot properly be regarded as part of the proceedings of the *anakrisis*. In effect such evidence was produced for the first time in court no matter when or where it was filed. The filing of evidence, as distinguished from the introduction of evidence to corroborate a litigant's answers to the questions of the magistrate, cannot properly be regarded as part of the proceedings of the *anakrisis*.

## CHAPTER X

### EISANGELIA

The term *εισαγγελία* signifies in general an "information" of any kind. As a matter of practice, however, in Attic law the term was applied almost exclusively to actions brought before a political body—i.e., the Areopagus (in early times), the Senate of Five Hundred, and the assembly. For the sake of convenience the term may be rendered "impeachment," because, like a modern impeachment, it was a trial before a political body.<sup>1</sup> The lexicographers furnish definitions of *εισαγγελία* and some information as to the types of cases in which the process was used. Harpocration describes *εισαγγελία* as a *δημοσία δίκη* and enumerates three varieties:

ἡ μὲν γὰρ ἐπὶ δημοσίοις ἀδικήμασι μεγίστοις καὶ ἀναβολὴν μὴ ἐπιδεχομένοις, καὶ ἐφ' οἷς μήτε ἀρχὴ καθέστηκε μήτε νόμοι κεῖνται τοῖς ἀρχουσι καθ' οὓς εἰσάξουσιν, ἀλλὰ πρὸς τὴν βουλὴν ἢ τὸν δῆμον ἢ πρώτην κατάστασις γίγνεται, καὶ ἐφ' οἷς τῷ μὲν φεύγοντι, ἐὰν ἀλῶ, μέγισται ζημίαι ἐπικεῖνται, ὁ δὲ διώκων, ἐὰν μὴ ἔλθῃ, οὐδὲν ζημιούται, πλὴν ἐὰν τὸ ἐ μέρος τῶν ψήφων μὴ μεταλάβῃ· τότε γὰρ χιλίας ἐκτίνει. τὸ δὲ παλαιὸν καὶ οὗτοι μειζρόνως ἐκολάζοντο. ἑτέρα δὲ εἰσαγγελία λέγεται ἐπὶ ταῖς κακώσεσιν· αὗται δ' εἰσὶ πρὸς τὸν ἀρχοντα, καὶ τῷ διώκοντι ἀζημίοι, κἂν μὴ μεταλάβῃ τὸ ἐ μέρος τῶν ψήφων. ἄλλη δὲ εἰσαγγελία ἐστὶ κατὰ τῶν διαιτητῶν· εἰ γὰρ τις ὑπὸ διαιτητοῦ ἀδικηθῇ, ἐξῆν τοῦτον εἰσαγγέλλειν πρὸς τοὺς δικαστάς, καὶ ἀλοὺς ἡτιμοῦτο.

The second and third classes are of no importance in the following discussion, since neither type of case came before a political body.<sup>2</sup>

Pollux offers the following definition of *εἰσαγγελία*:

ἡ δ' εἰσαγγελία τέτακται ἐπὶ τῶν ἀγράφων δημοσίων ἀδικημάτων κατὰ τὸν νόμον εἰσαγγελικὸν ἢ εἰσαγγελτικόν· ἀμφοτέρως γὰρ λέγουσιν· ὃς λέγει· περὶ ὧν οὐκ εἰσὶ νόμοι, ἀδικῶν δὲ τις ἀλίσκεται ἢ ἀρχῶν ἢ ῥήτωρ, εἰς τὴν

<sup>1</sup> Cf. Bonner, *Lawyers and Litigants in Ancient Athens*, pp. 34 and 26 ff.

<sup>2</sup> *κάκωσις* was the name applied to suits involving abuses to heiresses, parents, and orphans. Naturally these matters, as Harpocration says, came before the archon. Something of the procedure in the *εἰσαγγελία* against an arbitrator may be gathered from Demosthenes (xxi. 87). Cf. scholiast on Plato *Laws*, 466.

βουλὴν εἰσαγγελία δίδοται κατ' αὐτοῦ. καὶ μὲν μέτρια ἀδικεῖν δοκῇ, ἡ βουλὴ ποιεῖται ζημίας ἐπιβολὴν, ἂν δὲ μείζω, παραδίδωσι δικαστηρίῳ, τὸ δὲ τίμημα, ὃ τι χρὴ παθεῖν ἢ ἀποτίσαι. ἐγίγνοντο δὲ εἰσαγγελίαι καὶ κατὰ τῶν καταλυόντων τὸν δῆμον ἢ ρητόρων μὴ τὰ ἄριστα τῷ δήμῳ λεγόντων ἢ πρὸς τοὺς πολέμιους ἄνευ τοῦ πεμφθῆναι ἀπελθόντων, ἢ προδόντων φρούριον ἢ στρατιάν ἢ ναὺς, ὡς Θεόφραστος ἐν τῷ περὶ νόμων.<sup>1</sup>

Pollux' opinion briefly, then, is that in addition to a few specific offenses which he enumerates, the εἰσαγγελία could be used in all extraordinary crimes against the state, provided there was no special law by which they were to be handled. From the *Lexicon rhetoricum Cantabrigiense* a somewhat different idea is obtained.

εἰσαγγελία· κατὰ καινῶν καὶ ἀγράφων ἀδικημάτων. αὕτη μὲν οὖν ἡ Καικιλίου δόξα· Θεόφραστος δὲ ἐν τῷ τετάρτῳ περὶ νόμων φησὶ γενέσθαι, ἔάν τις καταλύῃ τὸν δῆμον ἢ ρήτωρ μὴ τὰ ἄριστα συμβουλεύῃ χρήματα λαμβάνων, ἢ ἔάν τις προδιδῷ χωρίον ἢ ναὺς ἢ πεζὴν στρατιάν ἢ ἔάν τις εἰς τοὺς πολέμιους ἀφικνῆται (ἄνευ τοῦ πεμφθῆναι παρὰ τοῦ δήμου) ἢ ἐνοικῇ παρ' αὐτοῖς ἢ στρατεῖται μετ' αὐτῶν δῶρα λαμβάνων.—Καικίλιος δὲ οὕτως ὥριστο· εἰσαγγελία ἐστὶν ὃ περὶ καινῶν ἀδικημάτων δεδῶκασιν ἀπενεγκεῖν οἱ νόμοι. ἔστι δὲ τὸ μελετώμενον ἐν ταῖς τῶν σοφιστῶν διατριβαῖς.<sup>2</sup>

Theophrastus and Caecilius are represented here as defining the process quite differently, for Theophrastus makes the εἰσαγγελία applicable to certain specified cases, while Caecilius applies it only to new offenses,<sup>3</sup> not listed in the criminal code.

The impression given by the lexicographers generally is that the process was mandatory for certain serious offenses. But there is no hint in them that the process was ever restricted absolutely to these offenses. It must always have been possible to employ εἰσαγγελία for unusual and serious offenses, such as the lexicographers describe as new and unwritten (καινῶν καὶ ἀγράφων). An example is the trial of the generals after Arginusae. This was a unique case in which, as is generally agreed, the process of εἰσαγγελία was employed.

<sup>1</sup> viii. 51, text as given by Hager, "On the Eisangelia," *Jour. of Philol.*, IV, 76.

<sup>2</sup> S.v. εἰσαγγελία, Hager's text.

<sup>3</sup> For comments by other lexicographers which do not differ materially from those given above, cf. s.v. εἰσαγγελία, Bekker, *Anecdota Graeca*, I, 244; and the scholiast on Plato *Laws* viii. 517.



The *εἰσαγγελία* became a very popular process, inasmuch as it relieved the plaintiff of certain technicalities and penalties of ordinary procedure. It afforded a means of bringing a case to trial with the utmost dispatch. In the second place, the *εἰσαγγελία* was advantageous for the good speaker,<sup>1</sup> inasmuch as he always appeared in either the senate or the assembly before the matter came before a court. Since the case never came before a court unless the senate or assembly thought it worth while, the result was that the case was prejudiced before it came into court. This, together with the fact that the defendant often did not await trial, doubtless explains why few acquittals in cases of *εἰσαγγελία* are mentioned.<sup>2</sup> Finally, the plaintiff did not have to pay the fine of 1,000 drachmas if he failed to receive a fifth part of the votes, at least in the earlier history of the *εἰσαγγελία*. For all of these reasons the process came to be employed very extensively, even for the most trivial offenses, until it was abused to the extent described by Hypereides.<sup>3</sup> It is possible that, in an attempt to restrict such abuses in the use of the process, the fine of 1,000 drachmas for failure to obtain one-fifth part of the votes was imposed in all *eisangeliae* just as in other types of cases. So Pollux explains Theophrastus' statement to the effect that an *eisangelia* involved the payment of this fine in case of failure to obtain sufficient votes:

ὅτι δὲ ὁ εἰσαγγέλῃας καὶ οὐχ ἔλῳν ἀζήμιος ἦν, Ὑπερείδης ἐν τῷ ὑπὲρ Δυκόφρονός φησι. καίτοι γε ὁ Θεόφραστος τοὺς μὲν ἄλλας γραφὰς γραψαμένους χιλίας τ' ὀφλισκάειν, εἰ τοῦ πέμπτου τῶν ψήφων μὴ μεταλάβοιεν καὶ προσατιμοῦσθαι· τοὺς δὲ εἰσαγγέλλοντας μὴ ἀτιμοῦσθαι μὲν, ὀφλεῖν δὲ τὰς χιλίας. ἔοικε δὲ τοῦτο διὰ τοὺς ῥαδίως εἰσαγγέλλοντας ὕστερον προσγεγράφθαι.<sup>4</sup>

The other lexicographers state that such a fine was imposed. Harpocration<sup>5</sup> says: ὁ δὲ διώκων ἐὰν μὴ ἔλῃ, οὐδὲν ζημιούται, πλὴν ἐὰν τὸ πέμπτον μέρος τῶν ψήφων μὴ μεταλάβῃ. τότε χιλίας ἐκτίνει· τὸ δὲ παλαιὸν καὶ οὗτοι μειζόνως ἐκολάζοντο. The account in the *Lexicon rhetoricum Cantabrigiense*<sup>6</sup> also

<sup>1</sup> Cf. Hypereides *Lyc.* 12.

<sup>2</sup> Cf. Hypereides *Eux.* 2; Hager, "On the *Eisangelia*," *Jour. of Philol.*, IV, 108.

<sup>3</sup> *Eux.*, 1 ff.

<sup>5</sup> *S.v.* *εἰσαγγελία*.

<sup>4</sup> viii. 52, 53.

<sup>6</sup> *S.v.* :

asserts that the fine was imposed: *περὶ δὲ τῆς εἰσαγγελίας, εἴαν τις μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων, οἱ δικάσται τιμῶσιν*. If such a fine ever was imposed, the law authorizing it must have been enacted about 338 B.C. Two passages from Hypereides' speech for Lycophron indicate that there was no fine when that oration was delivered: *οἱ μὲν γὰρ διὰ τὸ ἀκίνδυνον αὐτοῖς εἶναι τὸν ἀγῶνα ῥαδίως ὃ τι ἂν βούλωνται λέγουσι*,<sup>1</sup> and *ἵνα πρῶτον μὲν ἀκίνδυνος εἰσὶς εἰς τὸν ἀγῶνα*.<sup>2</sup> Certainly at the time that this speech was written there was no penalty involved for the prosecutor under any circumstances. Now with this may be compared a passage from Demosthenes' speech *On the Crown*: *οὐκοῦν ἐν μὲν οἷς εἰσηγγερόμεν, ὅτ' ἀπεψηφίσεσθέ μου καὶ τὸ μέρος τῶν ψήφων τοῖς διώκουσιν οὐ μετεδίδοτε, τότ' ἐψηφίσεσθε τὰ ἄριστα με πράττειν*.<sup>3</sup> This would seem to indicate that at the time when this speech was delivered there was some penalty in cases of *εἰσαγγελία*, if the prosecutor did not obtain one-fifth of the votes. But in a case which came first before a political body this seems peculiar. When the senate or the assembly, as the case might be, passed the matter on to a popular court, the initiative was no longer in the hands of the plaintiff. It seems hardly possible that the state would then have required the prosecutor to pay a fine in case he failed to receive a fifth part of the votes.<sup>4</sup> The only explanation for the loss of this immunity for the plaintiff is that the state desired to control the use of the *eisangelia* and to restrict it, as far as possible, to important political cases. If, however, this was the purpose, the penalty does not seem to have had the desired effect, for in Hypereides' speech in behalf of Euxenippus the speaker complains at length of the triviality of the cases which were handled by *eisangelia*. This speech is at least as late as, and presumably later than, Demosthenes' speech *On the Crown*.<sup>5</sup> But Demosthenes' statement does not nec-

<sup>1</sup> *Lyc.* 8.

<sup>2</sup> *Ibid.*, 12.

<sup>3</sup> xviii, 250.

<sup>4</sup> In a case like that of Antiphon, where the generals were instructed to prosecute and anyone could join in the prosecution, who would pay the fine? *X Oratorum Vitae*, 833 E. All such prosecutions would be authorized by a *ψήφισμα* (Lysias xiii. 35).

<sup>5</sup> Cf. Blass, *Attische Beredsamkeit*, III<sup>1</sup>, 419; III<sup>2</sup>, 56, for the dates of the speeches. He places *On the Crown* in 330 B.C. and Hypereides' speech between 330 and 324 B.C.

essarily imply a fine. It may be that he merely mentions the failure of his opponents to obtain one-fifth of the votes in order to show how overwhelming his victories had been. The lexicographers who mention the fine may have been misled by Demosthenes' statement.

The process of *eisangelia* was known in very early times in Athens. In the so-called Draconian constitution<sup>1</sup> the verb *εἰσαγγέλλειν* occurs: *ἐξήν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιδῶν βουλήν εἰσαγγέλλειν, ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον*. The action provided for here came before the Areopagus, but in later times the Senate of Five Hundred dealt with this kind of case.<sup>2</sup> It amounts to an action against public officials for malfeasance in office. An example of this type of *εἰσαγγελία* in later times is afforded by the lawsuit alluded to in Antiphon's speech for the *Choregus*<sup>3</sup> in which the choregus had brought an *eisangelia* before the senate against certain men, including the secretary of the thesmothetae, for theft, evidently of public funds.

Solon enacted a law of *eisangelia* against men who attempted to overthrow the government: *τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν (ἢ τῶν Ἀρεοπαγιδῶν βουλή), Σόλωνος θέντος νόμον εἰσαγγελίας περὶ αὐτῶν*.<sup>4</sup> It is this law which starts the history of the *νόμος εἰσαγγελτικός*. It is concerned with *eisangelia* only as a means of dealing with attempts to subvert the constitution.<sup>5</sup> Naturally in the Solonian period the Areopagus was the body before which *εἰσαγγελίαι καταλύσεως τοῦ δήμου* were heard. Up to the time of Solon the Areopagus had been the sovereign body in the state, and under his constitution it continued to be a body of utmost importance, with the special duty of guarding the constitution.<sup>6</sup>

<sup>1</sup> *Ath. Pol.* iv. 4.

<sup>3</sup> vi. 12, 35.

<sup>2</sup> *Ibid.*, xlv. 2.

<sup>4</sup> *Ath. Pol.* viii. 4.

<sup>5</sup> Freeman (*The Work and Life of Solon*, pp. 132 f.) thinks that Solon's law may have included other crimes than attempts on the government and that perhaps not all were brought before the Areopagus. She considers it significant, however, that the law in Hyperides deals only with this one crime. For the question as to the completeness of the law as cited in Hyperides, cf. *infra*, p. 306.

<sup>6</sup> *Ath. Pol.* viii. 4.

Cleisthenes was interested in transferring both political and judicial powers from the oligarchic body, the Areopagus, to the democratic bodies, the boulé and the assembly. It is clear that he permitted *eisangeliae* for attempts to overthrow the government to come before these bodies. There are several cases before the time of Ephialtes which are known to have come before the people. The first of these is the case of Miltiades who, after the failure of the expedition against Paros, was tried before the assembly on a charge of deceiving the people. With difficulty he escaped the death penalty, but was punished with a heavy fine.<sup>1</sup> Lipsius<sup>2</sup> believes that at the time of Miltiades there was a law which decreed death as a penalty for deception of the people and that it is the law of this period which Demosthenes repeats.<sup>3</sup> It is likely that in 493 B.C. Miltiades' trial for tyranny in the Chersonese was held before the people.<sup>4</sup> Phrynichus was tried by the Athenians for recalling to them in his drama the misfortunes of Miletus. This case undoubtedly came before the people.<sup>5</sup> Another case before the people is that of Hipparchus, who was impeached on a charge of *προδοσία* and who was condemned to death in his absence when he failed to appear to defend himself.<sup>6</sup> This occurred either during or subsequent to his ostracism in 487 B.C. Themistocles likewise was condemned to death by the people in his absence after being accused of participation in the treasonable activities of Pausanias.<sup>7</sup>

Cleisthenes must then have passed a law which granted permission to bring cases of this nature before the assembly or the senate. He may merely have copied the law of Solon, adding the senate and assembly to the Areopagus as proper bodies to have jurisdiction in such cases. That the Areopagus did not lose its right to try them is clear. According to Aristotle,<sup>8</sup> Themistocles expected to be tried before the

<sup>1</sup> Herodotus vi. 136. Cf. *supra*, p. 197.

<sup>4</sup> Cf. Herod. vi. 104; *supra*, p. 198.

<sup>2</sup> *Op. cit.*, p. 180.

<sup>5</sup> Herod. vi. 21; *supra*, p. 199.

<sup>3</sup> xx. 135; xlix. 67.

<sup>6</sup> Lycurgus *Con. Leoc.* 117.

<sup>7</sup> Thuc. i. 135, 138. This case is called *εισαγγελία* in the *Lex. Cantab.*, s.v. *εισαγγελία*.

<sup>8</sup> *Ath. Pol.* xxv. 3.

Areopagus on a charge of treasonable dealings with the Persians. At the same time he offered to show to the Areopagus certain persons who were conspiring to overthrow the government, with a view to their arrest and trial. The authenticity of Aristotle's statement about Themistocles has been disputed, but at any rate the passage indicates that at the time cases of treason were sometimes turned over to the Areopagus.<sup>1</sup>

It is reasonable to suppose that Ephialtes made the next change in the *nomos eisangeltikos* by depriving the Areopagus of all jurisdiction in such cases and by turning them over exclusively to the *boulé* and the assembly, in pursuance of his general policy. The provision that the *boulé* or assembly might turn any case of *είσαγγελία* over to a popular court probably antedates Ephialtes and is to be referred to the period of Cleisthenes' reforms, when the punitive powers of the *boulé* were diminished. The *boulé* was obliged to turn over to a court any case which deserved a greater penalty than that which the *boulé* was empowered to inflict, namely, 500 drachmas.<sup>2</sup> Doubtless the assembly also gave many of the cases which came before it over to the courts. Aristotle says that *eisangeliae* came before the *κυρία ἐκκλησία*<sup>3</sup> if they were introduced before the assembly. It is obvious, in view of the increasing popularity of the procedure, that the *κυρία ἐκκλησία* (once a month) would scarcely be able to settle all of the cases. The natural procedure, then, would be to send the cases to a court for settlement, after a preliminary hearing to determine whether the case deserved trial. The trial of the generals after Arginusae, however, shows that the assembly might at any time assert its right to try a case. That *eisangeliae* were commonly turned over to a court by a busy *boulé* or assembly as early as 422 B.C. is indicated by a passage of Aristophanes' *Wasps*:

<sup>1</sup> For the dispute about the possibility of Themistocles' presence in Athens at this time, cf. *supra*, p. 254.

<sup>2</sup> For an excellent account of the entire procedure in *είσαγγελία*, cf. Hager, *op. cit.*, pp. 98 ff.; cf. Gilbert, *Greek Constitutional Antiquities*, pp. 305 ff.

<sup>3</sup> *Ath. Pol.* xliii. 4.

ἔτι δ' ἡ βουλὴ χῶ δῆμος ὅταν κρίναι μέγα πράγμ' ἀπορήσῃ  
ἐψηφίσται τοὺς ἀδικούντας τοῖσι δικασταῖς παραδοῦναι.<sup>1</sup>

In the years following the reforms of Ephialtes few specific cases of *eisangelia* are mentioned, and not until the last part of the century are there any which deal with attempts on the government. A decree of 446 B.C.<sup>2</sup> provides that an *eisangelia* shall be brought before the *boulé* by the king archon in case of an encroachment on the Pelargikon and that the penalty for such an offense shall be 500 drachmas—the maximum penalty which the *boulé* could inflict. This is a religious matter. Soon after the beginning of the Peloponnesian War a decree, likewise dealing with religious matters, was proposed by Diopeithes, to the effect that persons should be impeached who neglected religion or taught new theories about the things above the earth. Such accusations were directed through Anaxagoras at Pericles: καὶ ψήφισμα Διοπέιθης ἔγραψεν εἰσαγγέλλεσθαι τοὺς τὰ θεῖα μὴ νομίζοντας ἢ λόγους περὶ τῶν μεταρσίων διδάσκοντας, ἀπερειδόμενος εἰς Περικλέα δι' Ἀναξαγόρου τὴν ὑπόνοιαν.<sup>3</sup> Later, another decree was passed, on the motion of Dracontides, that Pericles should make an accounting before the *prytaneis* of the money which he had spent and, according to an amendment of Hagnon, that any complaints should be tried before 1,500 jurors. It is probable that such complaints were to be brought by way of *eisangelia* but had to be turned over to a court.<sup>4</sup> Before Alcibiades sailed to Sicily, information was laid against him both before the assembly and before the *boulé* to the effect that he had had a part in the mutilation of the hermae and the profanation of the mysteries with a view to the overthrow of the democracy.<sup>5</sup> Although Alcibiades desired to stand his trial before the departure of the fleet, no trial occurred, and he sailed to Sicily. During his absence he was impeached by Thessalus. The form of the information brought by Thessalus is recorded by Plutarch.<sup>6</sup> It includes only impiety, i.e.,

<sup>1</sup> 590 f.

<sup>3</sup> Plutarch *Pericles*, xxxii.

<sup>2</sup> Dittenberger, *Sylloge*<sup>2</sup>, No. 20, 59 ff.

<sup>4</sup> Cf. Lipsius, *op. cit.*, p. 182, n. 17.

<sup>5</sup> Thucydides vi. 28 ff.; Andocides i. 11 ff., 37; Isocrates xvi. 6.

<sup>6</sup> *Alcibiades* xxii. It is generally believed that this case was tried by the assembly. Cf. Lipsius, *op. cit.*, p. 182.

the profanation of the mysteries. "Thessalus, son of Cimon, of Lacia, lays information that Alcibiades, son of Cleinias, of Scambonidae, has committed a crime against the goddesses, Demeter and Persephone, by representing in derision the holy mysteries, and showing them to his companions in his own house, where, being habited in such robes as are worn by the chief priest when he shows the holy things, he named himself the chief priest and Polytion the torch-bearer, and Theodorus of Phegaea the herald; and saluted the rest of the company as initiates and novices. All this was done contrary to the laws and institutions of the Eumolpidae and the heralds and priests of the temple." He was condemned, his property was confiscated, and it was decreed that all the priests and priestesses should curse him.

After the fall of the Four Hundred the orator Antiphon was impeached as a traitor.<sup>1</sup> It is probably about the time of this event that the *nomos eisangeltikos* was passed, substantially in the form in which it appears in Hypereides' speech for Euxenippus. Hypereides there says that the law prescribed the use of the process in the following cases:

ἐάν τις τὸν δῆμον τὸν Ἀθηναίων καταλύῃ ἢ συνίῃ ποι ἐπὶ καταλύσει τοῦ δήμου ἢ εταιρικὸν συναγάγῃ ἢ ἐάν τις πόλιν τινα προδῶ ἢ ναῦς ἢ πεζὴν ἢ ναυτικὴν στρατιάν, ἢ ῥήτωρ ὦν μὴ λέγῃ τὰ ἀριστα τῷ δήμῳ τῷ Ἀθηναίων χρημάτα λαμβάνων.<sup>2</sup>

The law as here given is then composed of three distinct clauses, each of which in its different way has to do with treachery to the Athenian state: (1) overthrow of the government, (2) betrayal of the military forces, and (3) accepting bribes as an orator. Three dates have been advanced for the passage of the law, namely, 411 B.C., after the overthrow of the Four Hundred;<sup>3</sup> 403-402 B.C., in connection with the reforms of Eucleides;<sup>4</sup> and the middle of the fourth cen-

<sup>1</sup> *X Or. Vit.*, 833 E.

<sup>2</sup> 7 and 8.

<sup>3</sup> Thalheim, *Hermes*, XXXVII, 339 ff.; XLI, 304 ff.; article "εἰσαγγελία" in Pauly-Wissowa.

<sup>4</sup> Caillemer, article "εἰσαγγελία," in Daremberg-Saglio. Bohm (*De εἰσαγγελίαις ad comitia Atheniensium delatis*) distinguishes three periods in the history of the law, the first to the overthrow of the Thirty Tyrants; the second to the wars with Philip, to which the law as quoted by Hypereides belongs; and the third to the end of Athenian independence.

tury.<sup>1</sup> In determining the date, it is necessary to consider both when a mention of the different provisions first appears in literature and to what periods the different provisions are most appropriate.

One of the chief reasons for dating the law at the time of the restoration of the democracy after the downfall of the Four Hundred is the occurrence of the phrase *ἐταιρικὸν συναγάγη* in the first part of the law. The oligarchic clubs had been unusually prominent in overthrowing the democracy in 411 B.C. It is true that they had long been recognized as an important feature of Athenian political life, but they were seen as a distinct menace in oligarchic conspiracies for the first time in the revolution of the Four Hundred.<sup>2</sup> According to Isocrates, in a speech written about 397 B.C., the information given against Alcibiades while he was still in Athens included the following phrase: *συνάγοι τὴν ἐταιρείαν*.<sup>3</sup> This certainly suggests the phrase as given by Hypereides and might lead to the conclusion that this clause was contained in the law before the Sicilian expedition. This does not, however, seem to be the correct view. The idea of conspiring for the overthrow of the constitution had been included in the law from the time of Solon. Isocrates, knowing, as did Thucydides, that others had worked in collusion with Alcibiades, and having in mind the phrase in the *nomos eisangelitikos*, makes the charge in this form. Isocrates gives the impression that a formal charge was brought against Alcibiades before the Sicilian expedition: *ἀμφοτέρας ταύτας συνθέντες τὰς αἰτίας εἰσήγγελλον εἰς τὴν βουλὴν, λέγοντες, ὡς ὁ πατὴρ μὲν συνάγοι τὴν ἐταιρείαν ἐπὶ νεωτέροις πράγμασιν, κ.τ.λ.* But the words in a following section show that these early charges were not formulated into an indictment: *νομίζων δεινὰ πάσχειν, ὅτι παρόντα μὲν αὐτὸν οὐκ ἔκρινον, ἀπόντος δὲ κατεγίγνωσκον*. Isocrates simply has in mind, then, the general charges which Thucydides refers to as follows in his more specific account: *ἐμεγάλυνον καὶ ἐβόων ὡς ἐπὶ δήμου καταλύσει*

<sup>1</sup> Lipsius, *op. cit.*, p. 192; Busolt-Swoboda, *Staatskunde*, II, 1008, n. 6.

<sup>2</sup> Cf. Calhoun, *Athenian Clubs in Politics and Litigation*, p. 21.

<sup>3</sup> xvi. 6.



τά τε μυστικά καὶ ἡ τῶν Ἑρμῶν περικοπὴ γένοιτο καὶ οὐδὲν εἴη αὐτῶν ὅτι οὐ μετ' ἐκείνου ἐπράχθη, ἐπιλέγοντες τεκμήρια τὴν ἄλλην αὐτοῦ ἐς τὰ ἐπιτηδεύματα οὐ δημοτικὴν παρανομίαν.<sup>1</sup> The actual impeachment of Alcibiades during his absence seems to have been based on the charge of impiety only.<sup>2</sup>

Now, under the Four Hundred the process of *eisangelia* was suspended along with other processes: ἔπειτα τὰς τῶν παρανόμων γραφὰς καὶ τὰς εἰσαγγελίας καὶ τὰς προσκλήσεις ἀνείλον.<sup>3</sup> It is to be expected that one of the early acts of the restored democracy would be the re-establishment of the process. And the enactment of the law to insure its use in cases of treasonable practices would be quite natural in view of the troubled political situation which the state had just passed through. At the time of the restoration of the democracy old laws were re-enacted and old processes were reorganized.<sup>4</sup>

The second clause in the law deals with relations with the allies. Such a clause would have been most appropriate sometime before the dissolution of the Athenian empire in 404 B.C., since it would naturally be enacted to obviate the danger of betrayal of the allied cities. At the beginning of the revolution of the Four Hundred, Peisander, on his return from Samos to Athens, abolished the democracies and established oligarchies in some of the cities through which he passed. Likewise, Oenoe was betrayed to the Boeotians by the oligarchs.<sup>5</sup> After such acts the enactment of the law would be entirely fitting. It may be objected that the clause applies, not to the first Athenian empire, but to the second. But there were no garrisons established in the cities of the second empire,<sup>6</sup> and the clause does not seem to apply. Furthermore, a passage in Lysias indicates that the clause was known as early as 399 B.C.: ἄξιον δὲ καὶ τόδε ἐνθυμηθῆναι,

<sup>1</sup> Thucydides vi. 28.

<sup>2</sup> Plutarch *Alcibiades* xxii.

<sup>3</sup> *Ath. Pol.* xxix. 4.

<sup>4</sup> *CIA* i. 57; i. 61. There was a commission appointed to make a general revision of the laws at this time. Lysias xxx. 2; cf. F. D. Smith, *Athenian Political Commissions*, p. 74.

<sup>5</sup> Thucydides viii. 64, 65, 98.

<sup>6</sup> *CIA* ii. 17; iv (2). p. 10; Hicks and Hill, *Greek Historical Inscriptions*, No. 101. 21 f.

ὅτι εἰ μὲν τις φρούριόν τι προύδωκεν ἢ ναὺς ἢ στρατόπεδόν τι, ἐν ᾧ μέρος τι ἐτύγχανε τῶν πολιτῶν ὄν, ταῖς ἐσχάταις ἂν ζημίαις ἐξημιούτο.<sup>1</sup>

There is one apparent reference to the third part of the law before the end of the fifth century: δεινὸν δέ μοι δοκεῖ εἶναι, εἰ τοῖς εἰποῦσι . . . μὴ τὰ ἄριστα ὁ μηδὲν εἰπὼν ταῦτά πείσεται.<sup>2</sup>

From the foregoing it is clear that before the end of the fifth century all three provisions as given by Hypereides were known and that the law was substantially the same as it was in Hypereides' time. It is quite possible that minor changes were made subsequent to the restoration of the democracy in 410 B.C., although the main body of the law remained the same. For instance, if the fine of 1,000 drachmas for failure to obtain one-fifth of the votes was ever imposed in cases of *eisangelia*, this provision may have been inserted in a revision of the law sometime between the date of Hypereides' *Pro Lycophrone* and Demosthenes' speech *On the Crown*.

Lipsius' chief reason (and in this he is followed by Busolt) for believing that the *nomos eisangeltikos* was not formulated until the second half of the fourth century, is that in the second half of the century he finds far heavier penalties in cases of *eisangelia* than previously, for, whereas in the first half of the century there are cases of fines as penalties, in the second half it is a question of death and denial of burial in Athens.<sup>3</sup> Furthermore, he finds the first sure case of the application of the νόμος εἰσαγγελτικός in *Hypereides v. Philocrates*.<sup>4</sup> None of the passages cited by Lipsius is conclusive evidence that the νόμος εἰσαγγελτικός provided the penalty of death in cases of *eisangelia*. The case rather seems to be that certain laws were passed determining punishment for certain offenses which were normally dealt with by *eisangelia*.<sup>5</sup>

It is clear that the *eisangelia* was a political process to be

<sup>1</sup> xxxi. 26. Some—e.g., Jebb, *Attic Orators*—date the speech a few years earlier.

<sup>2</sup> (Lysias) xx. 10; cf. also 5 and 13. This speech belongs to about 410 B.C.

<sup>3</sup> Cf. Demosthenes xix. 180; xxiii. 167; Aeschines iii. 51; Aristotle *Rhet.* ii. 1380b. 10; Hypereides *Lyc.* 20; *Eux.* 14, 18; Aeschines iii. 252; Lycurgus *Leoc.* 150.

<sup>4</sup> Cf. Hyp. *Eux.* 29 f., 39 f.

<sup>5</sup> Cf. *CIA* ii. 65; Thalheim, *Hermes*, XXXVII, 352.

used primarily against those who injured the state. It is only natural that it should be used in all such cases, as well as in those specifically mentioned in the law. Thus many cases for which definite processes were provided by law might in very serious instances, or even in instances not so serious, be handled by *eisangelia* instead, provided some political importance was attached to them. Hence the use of the procedure occasionally in ἀσέβεια or in δειλία, which were regularly dealt with by γραφή ἀσεβείας or γραφή δειλίας.<sup>1</sup> So it may be concluded that the offense of deception of the people, which, according to an old law cited by Demosthenes,<sup>2</sup> was punished by death, would naturally be handled by *eisangelia*. In addition, any sudden or terrible offense or offenses for which no procedure was specified (designated variously as καινόν, δημόσιον, ἄγραφον, ἑξαπιναιῶν)<sup>3</sup> would naturally be handled by *eisangelia*.

It has been suggested that the law as quoted by Hypereides is incomplete. Hager<sup>4</sup> adds two clauses, one dealing with naval affairs, taken from an inscription: ἐάν τις ἀδικῇ περὶ τὰ ἐν τοῖς νεωρίοις;<sup>5</sup> and the other dealing with the commercial laws, taken from the title of a lost oration of Dinarchus: κατὰ Πυθέου περὶ τῶν κατὰ τὸ ἐμπόριον εἰσαγγελία.<sup>6</sup>

<sup>1</sup> Cf. Lysias x. 1.

<sup>2</sup> xx. 100, 135. Cf. xix. 103; xlix. 67; and Hager, "How Were the Bodies of Criminals at Athens Disposed of after Death?" *Jour. of Philol.*, VIII, 7, n. 2.

<sup>3</sup> Lexicographers, s.v. εἰσαγγελία; Pseudo-Xenophon *Ath. Pol.* iii. 5.

<sup>4</sup> *Jour. of Philol.*, IV, 83 f.

<sup>5</sup> *CIA* ii. 811 c. 140 ff.; Boeckh, *Urkunden über das Seewesen des attischen Staates*, p. 536: ἐάν δὲ οἱ τῶν νεωρίων ἄρχοντες οἱ ἐφ' Ἡγησίου ἄρχοντος παραλαβούσης τῆς πόλεως τοὺς κωπέας μὴ ἀναγράψωσιν εἰς τὴν στήλην, ἥ δ' ἡ γραμματεὺς τῶν ἑνδεκα μὴ ἀπαλείψῃ ἀπὸ τοῦ ὀφλήματος τοῦ Σωπόλιδος τὸ γιγνόμενον τῶν κωπέων κατὰ τὰ ἐψηφισμένα τῇ βουλῇ, ὀφειλέτω ἕκαστος αὐτῶν XXX δραχμὰς τῷ δημοσίῳ, καὶ ὑπόδικος ἔστω Σωπόλιδι καὶ τοῖς Σωπόλιδος οἰκέοις τῆς βουλευσεως τοῦ ἀργυρίου τῆς τιμῆς τῶν κωπέων, ὧν ἂν ἡ πόλις παρεληφύα ἢ παρὰ Σωπόλιδος καὶ τῶν οἰκείων τῶν Σωπόλιδος. εἶναι δὲ καὶ εἰσαγγελίαν αὐτῶν εἰς τὴν βουλὴν, καθάπερ ἐάν τις ἀδικῇ περὶ τὰ ἐν τοῖς νεωρίοις.

<sup>6</sup> Dion. Hal. *De Din.* 10. Hager might well have considered that these crimes would be grouped as προδοσία and have been tried by εἰσαγγελία on that account. He elsewhere says, "Thus I arrive at the conclusion that εἰσαγγελία was applied to crimes enumerated in the νόμος εἰσαγγελτικὸς but also to all other crimes with, however, the restrictions that they must be referred to some section of the law and proceeded against under the name of one of the crimes specially designated" (*Jour. of Philol.*, IV, 78).

Thalheim<sup>1</sup> advances the theory that supplementary to the νόμος εισαγγελτικός three other crimes were admitted to the process of εισαγγελία in the early fourth century, namely, (1) deceptive promises to the people, (2) dishonesty on an embassy, and (3) any transactions that endangered the Athenian maritime confederacy. This last refers, of course, to the second Athenian confederacy.<sup>2</sup> These scholars have been led to think that the *nomos eisangeltikos* is incomplete because they regard the law as an attempt to restrict the use of the process and are therefore unable to account for the known cases of *eisangelia* which cannot be classified under any section of the law. Such difficulties disappear, however, if the thesis here set forth is adopted, namely, that the law was intended only to insure the use of the process in certain political cases.<sup>3</sup>

<sup>1</sup> *Hermes*, XXXVII, 346 ff.

<sup>2</sup> Cf. *CIA* ii. 17, 51 ff.

<sup>3</sup> The known cases of *eisangelia* have been very helpfully collected and classified by Hager (*op. cit.*, pp. 79 ff.). Hager, however, had no interest in dating the law as it stands in Hypereides, and therefore attempts to fit all the cases under his classifications with no reference to the date of the law. He begins with a case which was settled before the formulation of the law—the impeachment of Alcibiades for impiety. It has been maintained above that the case against Alcibiades was political as well as religious, and therefore might have been dealt with by *eisangelia* even after the passage of the law. Another case of κατάλυσις τοῦ δήμου is reported in Dinarchus i. 94: Καλλιμέδοντα εισαγγέλλων (Δημοσθένης) συνίεναι ἐν Μεγάροις τοῖς φυγάσιν ἐπὶ καταλύσει τοῦ δήμου; and there are hints of other such cases in Lysias xiii. 50 and xii. 48. Trials of generals on the charge of προδοσία furnish many cases of *eisangelia*. Cf. Dem. xix. 180; Lysias xxviii. 1, 11, 12, 17; the case of Cephisodotus, Dem. xxiii. 167; Aesch. iii. 51, 52; and the scholiast. For other examples, cf. Hager, *op. cit.*, p. 84. The trial of the generals after Arginusae is an important case of this type, although neither Xenophon nor Diodorus makes use of the term εισαγγελία in describing it. Cf. however, Hager, *op. cit.*, p. 85; Bonner, *op. cit.*, pp. 245 ff. Another famous case is that of Antiphon, who, with his associates, was accused of treason on an embassy (*X Oratorum Vitae*, 833e; cf. Thuc. viii. 68). With this may be compared the case of Aeschines, whom Demosthenes threatened to impeach on a charge of παραπροσβέλια (cf. Aeschines ii. 139; Dem. xix. 125, 131). Another early case is that of Aristarchus, who was tried and condemned for his activities under the Four Hundred: Ἀριστάρχῳ μὲν πρότερον τὸν δῆμον καταλόντι, εἰτα δ' Οἰνόην προδιδόντι Ὀθηλαίους πολεμίοις οὖσιν (Xen. *Hell.* i. 7, 28; cf. Thuc. viii. 98). There are several cases of *eisangelia* against orators who gave bad advice to the state under the influence of bribes. Cf. Hyp. *Eux.* 8, 39. ῥήτωρ in this clause of the law doubtless refers to those who made it their business to speak in assembly, and it might therefore be applied to any citizen, although Hypereides objects that Euxenipus was being tried under this clause, although he was an ἰδιώτης and not a ῥήτωρ (*Eux.* 40; cf. Hager, *op. cit.*, pp. 89 ff.). The clause could undoubtedly be used against anyone whose counsels given in public assembly turned out to be injurious to the state, especially if they were influenced by bribes.

When an impeachment was brought before either the *boulé* or the assembly, one of several things might happen. The assembly or the *boulé*, as the case might be, might fail to do anything about it. A case in point is the attempted impeachment of Alcibiades before he sailed to Sicily. Although, according to Andocides, information was laid before both bodies, he was not tried.<sup>1</sup> If it was felt that the matter should be brought to trial, there might arise a long discussion with many different opinions as to the proper disposal of the case. So, in the trial of the generals after Arginusae, three different propositions were made: (1) that the generals should be tried forthwith by the assembly; (2) that there should be a trial according to the decree of Cannonus, also before the assembly; and (3) that they should be tried before a court according to the law concerning temple robbers and traitors. The first proposition carried. Such a discussion was terminated by the passing of a *ψήφισμα* which provided for a trial either before one of these political bodies or before a *δικαστήριον*. Some extant psephisms of this kind provide some information as to their usual details. For instance, in the case against Antiphon the decree states the charge on which Antiphon was to be tried; it indicates the persons who were to produce the defendants in court; it specifies the prosecutors and determines the penalty in case of condemnation. That the penalty was regularly specified if the case was turned over to a court is indicated in Pollux' discussion of the *εἰσαγγελία*: *κἂν μὲν μέτρια ἀδικεῖν δοκῇ, ἢ βουλὴ ποιεῖται ζημίας ἐπιβολήν, ἂν δὲ μείζω, παραδίδωσι δικαστηρίῳ, τὸ δὲ τίμημα, ὃ τι χρὴ παθεῖν ἢ ἀποτίσαι*. The psephism might also specify the size of the court before which the trial was to take place: *εὐθέως κρίσιν τοῖς ἀνδράσι τούτοις ἐποιοῦν ἐν τῇ βουλῇ, ὃ δὲ δῆμος ἐν τῷ δικαστηρίῳ ἐν δισχιλίοις* ἐψήφιστο.<sup>2</sup>

The *nomos eisangeltikos*, then, has a continuous history from the time of Solon down through the fourth century at least. In the form in which it occurs in Hypereides, it could not have been passed until after the revolution of the Four

<sup>1</sup> Cf. *supra*, p. 301.

<sup>2</sup> Lysias xiii. 35. That these cases were *eisangeliae* is shown by Lysias xii. 48.

Hundred, but must have been passed soon after the restoration of the democracy. As it stands in Hypereides, it is a revision and amplification of the law of Solon's time, which doubtless had undergone several revisions during the course of the fifth century. The law never forbade that offenses other than those mentioned in the law should be tried by *eisangelia*, but merely made certain that these specified offenses should be so tried. There is plenty of evidence that any sudden or serious wrong was normally dealt with by this process. By the middle of the fourth century, and probably earlier, the process was widely employed for the most trivial offenses.

## CHAPTER XI

### THE JUDICIAL ORGANIZATION OF THE ATHENIAN EMPIRE

The administration of justice under the Athenian empire was influenced by two distinct ideas.<sup>1</sup> On the one hand, Athens desired to give to her allies a general feeling of security and equality in commercial matters. Hence, in commercial suits Athens provided reciprocity in litigation. Arrangements for the settlement of commercial suits gave the allies virtual equality with Athens.<sup>2</sup> On the other hand, there was a tendency on the part of Athens to exercise force and to transfer all real power to Athens. This policy is evident in her treatment of criminal cases. Here she exercised a close surveillance and, as far as possible, kept the means of judicial control in her own hands. Commercial cases and criminal cases must therefore be treated separately.

The system followed in dealing with commercial cases can be understood only by reference to certain previous developments in Greek judicial practice regarding the rights of foreigners. In Homeric society, foreigners appear to have had no means of judicial redress. In the time of Hesiod<sup>3</sup> they were permitted, in some cases at least, to use the local courts. With the growth of commerce it became desirable that facilities should be provided whereby foreigners could collect sums due them and that some definite guaranty of security of person and property should be provided. Hence there arose a very general practice of concluding treaties

<sup>1</sup> A summary of the administration of justice under the empire is provided here for the sake of completeness, although the subject is somewhat outside the scope of this study. For an exhaustive treatment, cf. Robertson, "University of Toronto Studies in History and Economics," Vol. IV, No. 1: *The Administration of Justice in the Athenian Empire*, which is followed closely in this summary.

<sup>2</sup> Thucydides i. 77; cf. Bonner, *Class. Phil.*, XIV, 284 ff.  
Antiphon, v. 78; cf. Robertson, *Class. Phil.*, XIX, 368.

<sup>3</sup> *Works and Days*, 225.

between states for their mutual advantage in the matter of providing for litigation between their citizens. The earliest extant treaties merely guarantee a certain degree of immunity from seizure.<sup>1</sup> Provision is then made for procedure in the nature either of reprisal by the aggrieved party or of intervention by a magistrate. Finally these treaties came to concern themselves also with cases of non-fulfilment of contracts and other commercial disputes, and practically guaranteed complete judicial reciprocity. At the time of the organization of the Delian League such treaties were doubtless in force between Athens and the chief commercial cities of Greece. Suits tried under the provisions of these treaties were called *δίκαι ἀπὸ συμβόλων*.

One of the most important features of the administration of justice under the Athenian empire was the trial of commercial cases between Athenians and members of allied states under the provisions of treaties (*σύμβολα*).<sup>2</sup> Robertson summarizes his findings with regard to *σύμβολα* and *δίκαι ἀπὸ συμβόλων* as follows:<sup>3</sup>

1. The treaties were ratified by a heliastic court under the presidency of the thesmothetae.<sup>4</sup> They were concluded both with the states of the empire and with states outside it, but more especially with the former. Among the allies they were in force with the autonomous cities and with the subordinate, including cities to which cleruchies had been sent after a revolt, though in this case the terms were presumably less favorable to the allies.

2. Two things were assured by these treaties: security from seizure, and reciprocity in the trial of certain cases. These were cases arising out of commercial contracts and

<sup>1</sup> Compare treaty between Chaleion and Oeanthea, *IG* ix. 333; Hicks and Hill, *Greek Historical Inscriptions*, No. 44. This treaty belongs to about 440 B.C.

<sup>2</sup> These cases were also known as *δίκαι συμβολαῖαι*, an expression which involved some ambiguity, as *συμβολαῖος* might be connected either with *σύμβολον*, a treaty, or with *συμβόλαιον*, a commercial contract. The fact that many cases were both "suits regulated by treaty" and "suits regarding commercial contracts" would tend to obscure the distinction.

<sup>3</sup> *The Administration of Justice in the Athenian Empire*, p. 22.

<sup>4</sup> Aristotle *Ath. Pol.* lix. 6; Pollux viii. 88. Cf. Lipsius, *op. cit.*, p. 968.



dealing with the same matters as *δίκαι ἐμπορικά*, though they differed from the latter in their wider range and in the procedure followed. Reciprocity was secured by the principle that *actio sequitur forum rei*,<sup>1</sup> with the probable exception that cases involving a state were referred to a third state for decision.

3. Treaty cases were tried, in some cases at least, not under the laws of either of the contracting states but under a special system determined by the treaty.<sup>2</sup> We have no evidence as to the details of the procedure followed, but it probably resembled that of Athens, not only on account of the preponderance of the capital city in the empire but also because of the fact that the procedure of the allies tended to approximate that of Athens. It is most probable that foreigners appearing in treaty cases did not require the services of a *πρόξενος* or *προστάτης*. The court before which these cases were brought was not the same as that which tried cases involving citizens only, nor yet the same as that which tried cases of foreigners not regulated by treaty. The presiding magistrates were always the *thesmothetae*,<sup>3</sup> except, apparently, in the case of Lesbos, where resident Athenian magistrates dealt with these cases.<sup>4</sup>

4. Finally, safeguards were provided,<sup>5</sup> to assure the allies of a means of redress in case of any infringement of the treaty regulations.

The liberality of Athens in these cases was obviously due to her desire to encourage trade.

A far different policy was followed by Athens in regard to political and criminal cases. Here her whole attitude was to subordinate and to restrict. Owing to the fact that the Delian League was formed under war-time conditions,

<sup>1</sup> Stahl, *De sociorum Atheniensium iudiciis commentatio*, p. 8.

<sup>2</sup> Stahl, *op. cit.*, p. 8; Hitzig, *Altgriechische Staatsverträge über Rechtshilfe*, p. 53; Busolt, *Geschichte*, III, 234; Wilamowitz, *Hermes*, XXII, 240.

<sup>3</sup> Aristotle, *op. cit.*, lix. 6.

<sup>4</sup> *CIA* iv (1). 96.

<sup>5</sup> *CIA* ii. 11; Hicks and Hill, *op. cit.*, No. 36; Dittenberger, *Sylloge*, No. 72. The decision of an Athenian magistrate rendered in a case which, according to the treaty, should not be tried in Athens was null and void, and the magistrate was liable to a fine of 10,000 drachmas.

powers were doubtless assigned to already existing officials and bodies rather than to newly instituted groups. There would, therefore, at once be a tendency to leave much of the executive power in the hands of the leaders of the league, the Athenians. There seems to have been at the outset little notion of the judicial disputes which might arise. Furthermore, the Athenians were the commanders-in-chief of army and navy, and their generals would deal with any cases in the field. Their authority might easily be extended to deal with any action on the part of an ally which hindered the execution of the purpose of the league.<sup>1</sup>

The need for a federal judicial system became apparent after the allies had begun to grow careless in the performance of their duties as allies. Athens by this time had begun her imperialistic policy. She had to have a system for forcing the allies to perform their duties. She undoubtedly supplied this need as occasion demanded, rather than usurped powers which had belonged to the league council. She was not slow to take advantage of the situation, but transferred important cases from the allies to her own courts. As revolting cities were conquered, the acts of settlement provided for the administration of justice under the control of Athens.

The allies fall naturally into three classes: the independent communities, those which had revolted and been reduced to a subordinate and tributary position, and those which voluntarily became subject. The position of the first class with regard to judicial matters is uncertain, but this comprised only a small minority of the allied cities and was finally reduced to two states—Chios and Methymna. The second class were undoubtedly subordinated to Athens both in political and in judicial matters. Separate decrees<sup>2</sup> were necessary to determine the relations of the revolting states, but these conformed to a general policy and followed certain

<sup>1</sup> Plutarch *Cimon* xi.

<sup>2</sup> For the decree regarding Erythrae (between 470 and 450 B.C.), *CIA* i. 9; Hicks and Hill, *op. cit.*, No. 32; Dittenberger, *op. cit.*, No. 8. For Miletus (between 450 and 447 B.C.), *CIA* iv (1). 22 A. For Chalcis (448 B.C.), *ibid.*, iv (1). 27 A; Hicks and Hill, *op. cit.*, No. 40; Dittenberger, *op. cit.*, No. 17. For discussion and bibliography, see Robertson, *op. cit.*, pp. 31 ff.

general regulations. In the case of the third class, which comprised the bulk of the communities which made up the Athenian empire, it would be most improbable that separate arrangements should be made with each petty state.

The facts regarding the treatment of these cases may be summarized as follows:<sup>1</sup>

1. These cases were subject to certain general regulations affecting all the cities of the empire.
2. Cases *ex delicto* involving Athenians and citizens of allied states were tried at Athens in the first instance.
3. Cases *ex delicto* involving allies only were tried in the local courts; but, in cases in which the penalties of death, exile, or the loss of civil rights were assessed or were fixed by law, the matter had to be referred to Athens.<sup>2</sup> This provision appears sometimes to have been extended to cases involving sums of more than 100 drachmas. The local courts possessed absolute jurisdiction only in cases involving a fine.
4. Sentences of perpetual banishment involved exile from the confines of the empire.
5. Some judicial powers were exercised by Athenian overseas officials.
6. The allies were assured a legal trial by the proper judicial authority.

An important group of cases before the Athenian courts were those arising from tribute assessments,<sup>3</sup> including appeals by the allies against the assessment of tribute and prosecution in cases of treasonable activity on the part of the allies which led to failure to pay tribute. In cases of dissatisfaction with the amount of assessment, the allies might appeal

<sup>1</sup> Robertson, *op. cit.*, p. 46.

<sup>2</sup> The reference was not, strictly speaking, an appeal. If the case was appealable, a defendant might decide not to exercise his right but to submit to a penalty beyond the competence of the local courts. But that this was not the case appears from Antiphon's statement that the death penalty could not be inflicted by a subject city: *ἀνεὺ Ἀθηναίων* (v. 47). This would seem to show that sentences carrying certain specified penalties had to be confirmed by the Athenian court. The consent of the defendant had nothing to do with the matter. Cf. Steinwenter, *op. cit.*, pp. 74-75.

<sup>3</sup> *CIA* i. 37; Hicks and Hill, *op. cit.*, No. 64, for the epigraphical evidence.

to an Athenian court; such cases came before the *εἰσαγωγεῖς*, and they were "monthly suits."<sup>1</sup> The other group of cases came also before an Athenian court under the chairmanship of the *ἐπιμεληταί*, and were "monthly suits."<sup>2</sup>

According to the system described above, the local courts of the allies retained very little jurisdiction. Cases *ex contractu* were in general tried as treaty cases. In cases *ex delicto* all suits involving an Athenian and a citizen of an allied state were tried in Athens; while cases involving only allies were tried in the local courts with the qualification that if the penalty was death, banishment, or *ἀτιμία*, the matter had to be referred to Athens. All tribute cases came to Athens. It is probable that the few cases which were retained by the local courts were supervised by Athenian overseas officials. In general, cases involving allies were tried by regular Athenian procedure. The procedure for treaty cases, however, was of course settled by the treaties. The allies pleaded their own cases before the heliastic courts, although they might, like Athenian citizens, have the help of professional speech-writers.

In the second confederacy organized under the terms of the Aristoteles decree (478-477),<sup>3</sup> the "treaty cases" (*δίκαι ἀπὸ συμβόλων*) continued to be settled on the basis of reciprocity, as under the empire.<sup>4</sup> The political affairs of the league were managed jointly by a council of the allied cities, on which Athens was not represented, and the Athenian authorities. Meetings were held at Athens; Athens was the executive head of the league.<sup>5</sup>

There are no general provisions in the decree regarding federal judicature. Whether the omission was accidental or intentional, the question of some sort of federal jurisdiction had to be faced in practice. According to the Aristoteles decree, if any measure was proposed or put to a vote intended

<sup>1</sup> Cf. Lipsius, *op. cit.*, pp. 85 and 901.

<sup>2</sup> *CIA* i. 38; iv (1). 38 A.

<sup>3</sup> *CIA* ii. 17; Hicks and Hill, *op. cit.*, No. 101; Dittenberger, *Sylloge*<sup>2</sup>, No. 147.

<sup>4</sup> (Demosthenes) vii. 9-13 proves that *δίκαι ἀπὸ συμβόλων* continued after the dissolution of the second confederacy.

<sup>5</sup> Diodorus xv. 28. Cf. Marshall, *The Second Athenian Confederacy*, p. 28.

to annul any provisions of the decree, the person responsible, whether a private individual or a magistrate, should be tried ἐν Ἀθηναίοις καὶ τοῖς συμμάχοις.<sup>1</sup> The penalty was banishment beyond the territories of Athens and the allies, or death with a prohibition of burial within the confines of Athens and the allies. The identity of the court contemplated is uncertain.<sup>2</sup> A federal court composed of Athenian and allied representatives may have been intended. The Aristoteles decree was a statement of policy rather than a complete constitution of the proposed league. Many details could only be worked out with the co-operation of the allies when the league was actually formed. The organization of a supreme court may have been one of them. It was a prominent feature of the Boeotian League of 447-446 which lasted until the peace of Antalcidas, 387-386 B.C. On the other hand, Athens may have tried Athenian offenders in her own courts, leaving the council of the allies to try allied offenders.<sup>3</sup> But neither Athens nor the allies would have had authority to enforce the prohibition regarding exile and burial. Only a supreme court would have jurisdiction over all territories included in the alliance. The difficulty involved in a dual legal jurisdiction could have been met by reporting all convictions for treason to the general meeting of Athenians and allies. In this way both Athenian and allied verdicts could have been made valid throughout the alliance. This seems to be the preferable view.<sup>4</sup>

But in spite of the self-denying Aristoteles decree, Athens was guilty of encroachments upon the judicial autonomy of

<sup>1</sup> CIA ii. 17, 56-63.

<sup>2</sup> For the various suggestions that have been offered, cf. Robertson, "The Administration of Justice in the Second Athenian Confederacy," *Class. Phil.*, XXIII, 30ff.

<sup>3</sup> Cf. Lipsius, *Berichte d. König. Säch. Gesellschaft d. Wissenschaft. zu Leipzig*, 1898, pp. 154 ff., and *Att. Recht*, p. 975.

<sup>4</sup> Other possibilities are a trial by the allies with appeal or reference to Athens for confirmation, or trial by both the Athenians and the allies. In favor of independent dual trials is cited the practice of deciding questions of peace and war. But this is too cumbersome a procedure when others were available. Cf. Robertson, *op. cit.*, p. 32.

her allies. After the revolt of Ceos, measures were taken to punish the guilty leaders. Any of the accused who claimed they were innocent could be tried in Ceos and in Athens: *ἐξεῖναι αὐτοῖς—δίκας ὑποσχέιν κατὰ τοὺς ὅρκους καὶ τὰς συνθήκας ἐν Κέῳ καὶ ἐν τῇ ἐκκλησίᾳ πόλει Ἀθήνησι*.<sup>1</sup> This seems to mean that the case was first tried in Ceos and then referred to Athens for confirmation. This is not, strictly speaking, an appeal.<sup>2</sup> The case went to Athens not by choice of the defendant but by the requirement of the Athenian decree. In another decree imposing commercial restrictions upon Ceos the words *εἶναι δὲ καὶ ἔφεσιν Ἀθήναζε καὶ τῷ φήναντι καὶ τῷ ἐνδείξαντι* occur.<sup>3</sup> And in a decree regarding Naxos<sup>4</sup> the words *τὰς ἐφεσίμους δίκας* indicate that certain types of cases had to be referred to Athens. These ranged all the way from cases involving 100 drachmas to the more important criminal cases. These provisions amount to a return to the system in vogue in the first Athenian empire.

<sup>1</sup> *CIA* iv (2). 54 B. Cf. Lipsius, *Att. Recht*, pp. 976 f.

<sup>2</sup> On the question of appeal, cf. Steinwenter, *op. cit.*, pp. 75 ff.

<sup>3</sup> *CIA* ii. 546.

<sup>4</sup> *Ibid.*, iv (2). 88d.

## CHAPTER XII

### ADMINISTRATION OF JUSTICE IN RURAL ATTICA

Thucydides dwells at some length upon the reluctance of the population of Attica to leave their homes and move into the city to escape the Peloponnesian invaders:

Because then of their long-continued life of independence [*αὐτονομῶ οἰκῆσαι*] in the country districts, most of the Athenians of early times and of their descendants down to the time of this war, from force of habit, even after their political union with the city, continued to reside with their households in the country.<sup>1</sup>

The political union of Attica involved the dissolution of councils and magistracies outside of Athens. But it is not at all likely that the social, political, and religious associations of the communities, that were embraced in the petty independent principalities, were suppressed. Some elements of local self-government must have survived in the village communities. These were grouped into forty-eight *naucrariae* for the purpose of levying taxes and drafting military forces. The council of the *naucraroι* played such an important part in public affairs that Herodotus credited it with the chief authority in the state at the time of the Cylonian attempt at tyranny.<sup>2</sup> All Athenian magistrates and officials had some judicial functions. It may be that the naucrars, each in his own district, exercised some judicial functions; but there is no hint of such powers in the sources.

In all periods the Athenians were ever ready to resort to arbitration for the settlement of their less serious disputes. We may be sure that in the village communities arbitration played a part in the relations of the people. Perhaps Peisistratus, in sending out the "rural justices," was seeking to strengthen his hold on the people by substituting his own adherents for the local arbitrators.<sup>3</sup> When Cleisthenes got

<sup>1</sup> Thucydides ii. 16, Smith's translation.

<sup>2</sup> Cf. *supra*, p. 130.

<sup>3</sup> Cf. *supra*, p. 184.

control of Athens after the expulsion of the tyrants, he abolished both the *naucraroι* and the local justices. He organized units of self-government in the village communities known as "demes" under "demarchs."<sup>1</sup> These political groups played an important rôle in the state.

Citizenship depended upon registration in a deme roll.<sup>2</sup> Sons of citizens were registered by their fathers in the presence of the deme assembly. Full opportunity for offering objections to the admission of the candidate was afforded. Naturalized citizens chose their own demes. A man's right to citizenship could always be tested in court by anyone by means of a *γραφὴ ξενίας*.<sup>3</sup> Occasionally thoroughgoing revisions of the lists of citizens were made by the deme assemblies. The proceeding was known as a *διαψήφισις*.<sup>4</sup> Haussoullier<sup>5</sup> maintains that these sessions were not judicial. This view is not quite correct.<sup>6</sup> It is true that no set time was allowed to accusers and defendants, as in a court of law. But anyone might address the assembly on behalf of himself or another, and all members were sworn and voted secretly by ballot. These characteristic features of a trial clearly distinguish the *διαψήφισις* from the regular meetings of the deme assembly. Anyone whose name was stricken from the deme roll of citizens could appeal to a heliastic court. If the appeal was rejected, the appellant was liable to be sold as a slave.<sup>7</sup>

The elaborate Athenian system of auditing public accounts was reproduced with modifications in the demes. In an inscription from the deme of Myrrhinus detailed provisions for the official audit are found. Even the wording

<sup>1</sup> Aristotle *Ath. Pol.* xxi. 5.

<sup>2</sup> Haussoullier, *La vie municipale en Attique*, p. 13.

<sup>3</sup> Lipsius, *Das Attische Recht*, p. 412. Admission to the body of citizens was carefully guarded. Some of the more material benefits of citizenship were enhanced by keeping the numbers down. Aristophanes (*Wasps*, 718) jests about the numerous prosecutions on the occasion of a distribution of grain. Cf. Plutarch *Pericles* xxxvii.

<sup>4</sup> Lipsius, *op. cit.*, pp. 414-15.

<sup>5</sup> *Op. cit.*, p. 44.

<sup>6</sup> Gilbert, *Greek Constitutional Antiquities*, p. 208.

<sup>7</sup> Isaeus, xii, and Demosthenes, lvii, are our chief sources of information regarding these appeals. Cf. Lipsius, *op. cit.*, p. 415.



of the oaths administered to the three classes of officials, constituting the auditing committee, are given. The auditor (εὐθυνος) and the accountant (λογιστής), assisted by the *synegoroi*, guardians of the public interest, went over the documents in each case in the presence of the assembled demesmen. The verdict of this commission under the chairmanship of the auditor was not valid unless approved by ten demesmen elected by the deme assembly and sworn by the demarch.<sup>1</sup>

The most interesting and instructive feature of the proceeding is the provision for an immediate appeal to the assembled demesmen under oath, provided there are thirty in attendance. For the deme of Myrrhinus thirty constituted a quorum, just as for certain functions 6,000 constituted a quorum of the ecclesia.<sup>2</sup> Szanto's<sup>3</sup> view that if only a quorum were present the vote must be unanimous is not supported either by the wording of the document or by the analogy of Athenian practice. It is specifically stated in the document that a majority of the ten was required to reverse the verdict of the auditor. If a unanimous vote of a quorum in the assembly was required to reverse the verdict of the ten, such an unusual requirement would surely have been mentioned. Apparently the entire proceeding in connection with the audits took place in the presence and hearing of the assembly, so that the various votes could be taken without delay if a quorum was present; otherwise an adjournment would be necessary. Appeals were discouraged by an addition of 50 per cent to the fine in case of failure. In another fourth-century document<sup>4</sup> provision is made for the arbitration of disputes between the deme of Aexone and the lessees of public lands or farmers of public revenues who were in arrears, which otherwise would go to the heliastic courts. An agreement, confirmed by oaths and pledges, to abide by the arbitral award and not to have recourse to litigation was required. The demarch, aided by advocates (σύνδικοι), presents the case against the lessees alleged to be in arrears. A

<sup>1</sup> CIA ii. 578; Haussoullier, *op. cit.*, pp. 80 ff.

<sup>2</sup> Cf. *supra*, pp. 194 ff.    <sup>3</sup> *Untersuchungen über das attische Bürgerrecht*, p. 36.

<sup>4</sup> Haussoullier, *op. cit.*, pp. 87 ff.

curious situation arises: the deme is at once party and judge. But the submission of the case to arbitration is voluntary.

The demarch had no real judicial functions. But just as Athenian magistrates presided over meetings of the dicasteries, so the demarch presided over the judicial proceedings of the assembly and administered the oath. But this is not significant, because he presided over all meetings of the assembly. Like all Athenian executive officers, he had the right to inflict fines upon demesmen who obstructed him in the performance of his duties.<sup>1</sup> As chief magistrate the demarch represented the municipality in all legal proceedings in which it was a party. Thus, when a rejected citizen appealed to a heliastic court against the vote of the assembly in the revision of the roll of citizens, the demarch, assisted by five chosen advocates, opposed the appeal.<sup>2</sup>

An extant inscription<sup>3</sup> shows that advocates were granted special honors as a recognition of their services to the deme. No doubt, like the city advocates, they received pay as well.

There has been considerable difference of opinion, both in ancient and in modern times, as to the nature of the intervention of the demarch in the process of seizing the property of debtors and condemned criminals. Outside of the lexicographers and scholiasts, only two passages refer to the subject. In the sentence of death and confiscation of property passed upon Antiphon and Archeptolemus in 410 B.C., the demarchs of their respective demes were directed to identify the property involved.<sup>4</sup> This document, quoted by Pseudo-Plutarch, goes back to Craterus' collection. In the *Clouds* of Aristophanes<sup>5</sup> Strepsiades complains to his son that he has lost some suits and is being threatened with seizure of his goods and chattels in pledge for interest. In answer to his son's query as to why he is tossing about on his bed, he

<sup>1</sup> Schoeffer, article "Demarchoi" in Pauly-Wissowa, IV, 2708. In the case of the demarch such fines had to be confirmed by a dicastery. Cf. *supra*, p. 279.

<sup>2</sup> Aristotle *Ath. Pol.* xlii. 1. Cf. *CIA* iv. 2. 583b.

<sup>3</sup> *CIA* ii. 581.

<sup>4</sup> Pseudo-Plutarch, *X Oratorum Vitae*, 834 A. τὼ δὲ δημάρχῳ ἀποφῆναι τὴν οὐσίαν αὐτοῦν.

<sup>5</sup> Lines 33 ff.

replies: *δάκνει με δήμαρχός τις ἐκ τῶν στρωμάτων*. The plain implication is that as a result of his failure to pay his creditors he expects visits of the demarch of Cicynna.

The rôle of the demarch under the circumstances set forth in these passages is not entirely clear. According to the lexicographers<sup>1</sup> and the scholiast on Aristophanes' *Clouds*, 37, the demarch not only kept a register of the real estate in his deme but recorded pledges of property to secure payment of money owed. As to the register of real estate, there can be little doubt that the lexicographers are right.<sup>2</sup> But there is not sufficient evidence to warrant the belief that the demarch registered chattel mortgages. It is, however, clear that in some fashion the demarch intervened in the seizure of goods to satisfy a judgment. But, in view of the fact that we have in a speech attributed to Demosthenes,<sup>3</sup> a very detailed account of the seizure of the chattels of a judgment debtor and the murder of a female servant, without any mention of a demarch, it seems likely that all the demarch could be required to do was to assist creditors by pointing out the habitation and property of the debtor whose goods and chattels were *ἐνέχυρα*.

<sup>1</sup> Suidas; and Harpocration, *s.v.* *δήμαρχος*.

<sup>2</sup> Thalheim (*Lehrbuch der griechischen Rechtsalterthümer*, p. 57, n. 1) accepts the statements of the lexicographers. Lipsius doubts the existence of real estate registers in the office of the demarch (*op. cit.*, p. 302, n. 12) but thinks that it was usual (*üblich*) for the demarch to accompany men making seizures (p. 950).

<sup>3</sup> xlvi. 53 ff.

## CHAPTER XIII

### THE OLIGARCHIC REACTION

No revolution in fifth-century Athens could fail to modify very fundamentally the democratic judicial system. The popular courts constituted the bulwark<sup>1</sup> of Athenian democracy. The constitutional history of Athens is largely a record of the various enactments that enlarged and consolidated their power, such as the restriction of the powers of the Areopagus, the limitation of the punitive power of the Senate of Five Hundred, the *γραφὴ παρανόμων*, the law regulating impeachments (*νόμος εἰσαγγελτικός*), and the provision of pay for jurors. These reforms encountered much opposition. Pericles' introduction of pay for jury service in particular called forth much criticism. Aristotle says:

Pericles was the first to institute pay for service in the law-courts, as a bid for popular favor to counterbalance the wealth of Cimon. . . . Some persons accuse him of thereby causing a deterioration in the character of the juries, since it was the inferior people who were anxious to submit themselves for selection as jurors, rather than the men of better position.<sup>2</sup>

It has been suggested that Aristotle may have had in mind the animadversions of Plato, who in the *Gorgias*<sup>3</sup> represents Socrates as saying:

I should like to know whether the Athenians are supposed to have been made better by Pericles, or, on the contrary, to have been corrupted by him; for I hear that he was the first who gave the people pay, and made them idle and cowardly, and encouraged them in the love of talk and of money.

The rejoinder of Callicles that Socrates must have heard that from the philo-Spartan set shows that this was the view of the conservatives who, if not openly anti-democratic, were at least strongly opposed to the extreme type of democracy developed in Athens. This sentiment undoubtedly goes back to the fifth century.

<sup>1</sup> Aristotle *Ath. Pol.* ix. 1.

<sup>2</sup> *Ibid.*, xxvii. 3-4.

<sup>3</sup> 515 E.

Not much constructive fifth-century criticism has survived. Indeed, there could be little so long as the theory prevailed that those who governed should administer justice. There could be no real improvement until people were willing to intrust large judicial powers to men fitted by training and temperament to exercise them wisely. Some advanced views were expressed in the fourth century which may well have had their counterpart in the days of Pericles. In the *Republic*<sup>1</sup> Plato maintained that justice should not be administered by butchers and bakers and candlestick-makers. Here he was far in advance of the times. But in the *Laws*,<sup>2</sup> a more practical treatise, he reverts to the normal Greek view:

In the judgment of offenses against the state the people ought to participate, for when anyone wrongs the state they are all wronged, and may reasonably complain if they are not allowed to share in the decision. . . . And in private suits, too, as far as possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all.

But he goes so far as to recommend the establishment of a supreme court of appeal. The idea of an appeal did not originate with Plato. Appeals of various kinds were familiar in Athenian practice of the fifth and fourth centuries. Appeal was one of the most significant features of Solon's reforms. But the originality of Plato's scheme was the character of the proposed court. It was virtually a body of experts.<sup>3</sup> Socrates in the *Apology*<sup>4</sup> suggests that in capital cases more time, even several days, should be allowed for the trial. This is a criticism of current practice.

Isocrates, writing in 355 B.C., charged the courts of his day with laxity and advocated a return to the *πάτριος πολιτεία* when the Areopagus was guardian of the laws and the constitution:

In those days, in adjudicating suits for the recovery of money lent out, they did not favor the debtors but obeyed the laws, being more indignant at those who tried to evade payment than the victims themselves, for they believed that the poor rather than the rich were injured when confidence in loans was destroyed.<sup>5</sup>

<sup>1</sup> 397 D.

<sup>2</sup> 768 A, Jowett's translation.

<sup>3</sup> *Laws* 767 C.

<sup>4</sup> 37 A.

<sup>5</sup> *Areopagiticus* 34. Cf. *Antidosis* 142.

The *πάτριος πολιτεία* was a favorite slogan of both reactionaries and reformers in the fifth century. Pseudo-Xenophon, writing in 424 B.C., observes that "in their courts the Athenians are more concerned with what is to their advantage than what is just" and that "a bad man has a better chance of escaping justice in a democracy."<sup>1</sup> He rejects the suggestion that the congestion of the courts might be cured by providing more panels because the smaller numbers would be more easily bribed.

Any large modification is out of the question, short of damaging democracy itself. No doubt many expedients might be discovered for improving the constitution, but if the problem is to discover some adequate means of improving the constitution while at the same time democracy is to remain intact, I say it is not easy to do.<sup>2</sup>

The plain implication of such language is that the only way to improve the democratic administration of justice is to abolish democracy. There are indications in the essay that the problem of restricting litigation had been raised. After giving a list of the different types of cases that came before the courts, the writer inquires: "Must we not recognize the necessity of deciding all these matters? Otherwise let anyone mention one, the settlement of which is not compulsory."<sup>3</sup> Some critics believed that the indefiniteness of the laws of Solon was responsible for much unnecessary litigation.<sup>4</sup> Aristotle found no justification for this criticism, but it was familiar to conservative circles in the fifth century. When the revolutionists got control of the government, their measures seem to indicate that they believed it.

Twice in the last quarter of the fifth century the oligarchs had an opportunity of putting into effect current suggestions for the improvement of the administration of justice. Both in 411 and in 404 B.C. the oligarchs employed constitutional means to overthrow democracy, by appointing commissions of thirty to draft a constitution based on the *πάτριος πολιτεία*. According to Thucydides,<sup>5</sup> the commission of 411 B.C. merely recommended the abrogation of the *γραφῆ*

<sup>1</sup> *Ath. Pol.* i. 13; ii. 20, Dakyns' translation.

<sup>2</sup> *Ibid.*, iii. 6.

<sup>3</sup> *Ibid.*, iii. 8 ff.

<sup>4</sup> Aristotle *Ath. Pol.* ix. 2.

<sup>5</sup> viii. 67. Cf. Aristotle *op. cit.*, xxix. 4.

παρανόμων. By thus destroying the greatest safeguard of the constitution the revolutionists rendered the courts powerless. Any proposal could be brought before the assembly. The government was put into the hands of the Four Hundred, who took the place of the senate and filled the magistracies with their adherents.

Criminal cases came before the Four Hundred as senators, with power to inflict even the death penalty. Andocides<sup>1</sup> was arraigned before them, charged with supplying grain and oar spars to the army at Samos, which had espoused the cause of democracy. Technically the indictment was for trading with the enemy. At first the senate seemed disposed to put him to death, but in the end it sent him to prison. According to Thucydides,<sup>2</sup> an Argive implicated in the murder of Phrynichus was apprehended and "tortured by the Four Hundred." The torture was applied for the purpose of procuring a confession. No other case of judicial action on the part of the Four Hundred is recorded. But during the four months they were in power, they put a few to death, imprisoned some, and banished others.<sup>3</sup>

No trials for homicide are reported, but there is no evidence that the Areopagus did not continue to function as a homicide court. The intervention of the Four Hundred in the inquiry regarding the death of Phrynichus was to secure evidence.

There is no information regarding the disposal of civil cases. Popular courts could have been recruited from the ranks of the Five Thousand, but there is every reason to believe that this body existed only on paper until, upon the overthrow of the Four Hundred, the assembly voted to turn over the government to them. Whether the constitutions described by Aristotle belong to this transitional period after the overthrow of the oligarchy or to the oligarchic régime makes little difference, for they contain no definite provisions regarding the judiciary. The temporary or transitional constitution provided for a council of 400. "In all that concerned the laws, in the examination of official accounts, and in other

<sup>1</sup> ii. 13 ff.

<sup>2</sup> viii. 92.

<sup>3</sup> *Ibid.*, viii. 70. 2.

matters generally it might act according to its discretion."<sup>1</sup> This section of the constitution undoubtedly gave the council a free hand in organizing the judiciary. In the definitive constitution which never came into effect there is not a word about the judiciary.

To a modern reader this seems to be a strange omission. There are two possible explanations. Either Aristotle omitted the matter in his summary, or the commission, having provided the machinery of government, left these and other details of administration to be worked out by the new government. This is what Plato proposed in the *Republic*.

Good citizens will themselves discover the necessary regulations regarding the business of the agora, about bargains and contracts with artisans, about insults and injuries, and the order in which cases are to be tried and how judges are to be appointed.<sup>2</sup>

The Commission of Thirty in 404 B.C. did not, like the committee appointed in 411 B.C., report back to the assembly, but deferred their report indefinitely. Meanwhile they filled the magistracies and the boulé with their adherents. Such laws as they required they reported to the boulé for ratification.<sup>3</sup> Xenophon<sup>4</sup> speaks of Critias, along with Charicles, as *νομοθέτης*. This simply means that these men, because of their prominence, were credited with initiating all the legislation of the Thirty. Owing to their longer tenure of power and their firmer grip on the situation, the Thirty made a deeper impression on their own and the succeeding generation than the Four Hundred. Consequently more data are available for reconstructing the history of their rule. Some of their statutes known as "new laws"<sup>5</sup> (*καινοὶ νόμοι*) deal with the administration of justice. They are laws such as might have been promulgated by the governments provided for in the constitutions summarized by Aristotle in connection with his account of the Four Hundred.<sup>6</sup> In two instances

<sup>1</sup> Aristotle, *op. cit.*, xxxi. Cf. Smith, *Athenian Political Commissions*, p. 66; Ferguson, "The Constitution of Theramenes," *Class. Phil.*, XXI, 72.

<sup>2</sup> 425, Jowett's translation.

<sup>3</sup> Aristotle *op. cit.*, xxxvii.

<sup>4</sup> *Memorabilia* i. 2. 31. Cf. Demosthenes xxiv. 90.

<sup>5</sup> Xenophon *Hellenica* ii. 3. 51.

<sup>6</sup> Aristotle *op. cit.*, xxx and xxxi.



the legislation reflects very closely current criticism of the democratic judicial system.

They revised such of the laws of Solon as were obscure and so were responsible for much unnecessary litigation. The avowed purpose of these changes was that "no opening might be left for the professional accuser." As an example, Aristotle<sup>1</sup> cites their "making the testator free once for all to leave his property as he pleased, and abolishing the existing limitations in case of old age, insanity, and undue female influence." He admits that the laws of Solon were not always drawn up "in simple and explicit terms" and cites the law regarding inheritances as an illustration. But he rejects the naïve view that Solon did this purposely "in order that the final decision might be in the hands of the people." His own view is that the obscurities were due to the "impossibility of attaining ideal perfection when framing a law in general terms."<sup>2</sup>

Another law forbidding instruction in λόγων τέχνη<sup>3</sup> was really a blow at the courts. Xenophon says it was aimed at Socrates by Critias, because of a long-standing personal grievance against him. But such an ordinance, if enforced for any considerable period, would not only destroy all higher education but would prevent young men from obtaining an adequate training for appearing before the courts. And courts could not function properly without competent accusers.

The Thirty rescinded also the laws of Ephialtes and Archestratus regarding the Areopagus. Ephialtes is said "to have stripped the Areopagus of all the acquired prerogatives from which it derived its guardianship of the constitution, and assigned some of them to the council of the Five Hundred and others to the assembly and the law courts." Some ten years later Pericles τῶν Ἀρεοπαγιτῶν ἕνια παρέιλετο.<sup>4</sup>

There are no references to cases before the Areopagus and the other homicide courts. The theory has been advanced

<sup>1</sup> *Ibid.*, xxxv. 2.

<sup>2</sup> *Ibid.*, ix. 2. Cf. Aristotle *Politics* 1282b.

<sup>3</sup> Xenophon *Memorabilia* 1. 2. 31. Cf. Grote, *op. cit.*, VIII, 257.

<sup>4</sup> Aristotle *Ath. Pol.* xxv and xxvii. Cf. *supra*, pp. 252 ff.

that the Thirty suspended the Areopagus as a homicide court. Some scholars have cited in support of this theory a provision<sup>1</sup> of the amnesty agreement of 403 B.C. as it appears in Aristotle. No critic of the Athenian system of administering justice in the fifth or fourth century had any fault to find with the Areopagus as a court. On the contrary, it was uniformly praised and approved.<sup>2</sup> The judicial functions of the Areopagus were so intimately associated with religion that even the most reckless revolutionists would have hesitated to interfere with them. The attitude of the Thirty toward the Areopagus is shown in the restoration of the ancient prerogatives of which it had been deprived by Ephialtes. Only the most unequivocal evidence would justify us in believing that the Thirty with one hand restored political powers and with the other took away semi-religious functions. There was nothing to gain by such proceedings.

The passage in Aristotle<sup>3</sup> as it appears in recent editions is as follows: τὰς δὲ δίκας τοῦ φόνου εἶναι κατὰ τὰ πάτρια, εἴ τις τινα αὐτοχειρία ἔκτεινεν ἢ ἔτρωσεν, τῶν δὲ παρεληλυθόντων μηδενὶ πρὸς μηδένα μνησικακεῖν ἐξεῖναι, κ.τ.λ. The provision is just what one would expect in an amnesty agreement or proclamation. Homicide involved pollution. Consequently amnesty could not be extended to murderers who for any reason had escaped justice under the Thirty. Previous amnesty proclamations had always excluded homicides.<sup>4</sup> The amnesty of 403 B.C. was no exception, as this provision shows.

<sup>1</sup> Aristotle *op. cit.*, xxxix. 5. Lipsius, *op. cit.*, p. 42, n. 129.

<sup>2</sup> Xenophon, *Memorabilia* iii. 5. 20, represents Socrates as asking the younger Pericles "whether he knew of any judges whose verdicts were more excellent, more in accordance with law, more respected or more just than those of the Areopagus."

<sup>3</sup> *Op. cit.*, xxxix. 5. This is the reading of Kenyon, Oxford text, 1920, and of Oppermann, Teubner text, 1927. Sandys' αὐτόχειρ yields the same sense as αὐτοχειρία. Thalheim (*Berliner Philologische Wochenschrift*, 1909, p. 703) objected to the accepted reading on the ground that if the first sentence contained an exception to the general amnesty, ἄλλων was required in the next sentence, and reads ἐκτρέσαστο τρώσας (Teubner text, 1909). The meaning of the provision thus emended is that redress for wrongs suffered under the Thirty was not to be sought either by self-help or by judicial proceedings. This is not convincing. The point regarding ἄλλων is not of sufficient weight to justify the importation of such a novel term into the amnesty.

<sup>4</sup> Andocides 1. 78. Cf. *supra*, p. 104.

According to this section of the agreement, anyone was liable to prosecution for homicide committed *αὐτοχειρία* during the rule of the Thirty. The word *αὐτοχειρία* was intended to distinguish ordinary homicides from the judicial murders of the Tyrants, in which they tried to involve as many as possible as aiders, abettors, and accessories.<sup>1</sup> Thus the men who arrested Leon of Salamis, and others like them, were amply protected. Responsibility for judicial murders was put upon the Thirty and the others specified in the agreement. These either submitted to an audit or went into voluntary exile. Eratosthenes,<sup>2</sup> against whom the chief charge was responsibility for the death of Polemarchus, one of the victims of the Thirty, submitted to an audit. In any case, full provision was made to protect citizens from pollution due to the presence of murderers in their midst. This provision of the amnesty agreement thus interpreted affords no support for the theory, based upon a passage in Lysias, that the Thirty suspended the Areopagus as a homicide court.<sup>3</sup> A client of Lysias in a speech of uncertain date says of the Areopagus: *ὦ καὶ πατριὸν ἐστὶ καὶ ἐφ' ἡμῶν ἀποδέδοται τοῦ φόβου τὰς δίκας δικάζειν*. If one insists upon translating *ἀποδέδοται* "has been restored," the natural interpretation of the passage is that, during the reign of terror, sittings of the Areopagus as a homicide court were suspended *de facto* but not *de jure*. From motives of self-interest and self-preservation, citizens doubtless refrained from prosecuting homicides. With the return of democracy came freedom of action. Rights were now again exercised that had merely been allowed to lapse. The most recent editors, reading *ἀποδέδοται*, translate: "Le tribunal d'Aréopage lui-même qui, comme au temps de nos ancêtres, a aujourd'hui le privilège des affaires de meurtre."<sup>4</sup>

<sup>1</sup> Plato *Apology* 32c.

<sup>2</sup> Lysias xii. According to the amnesty agreement, these cases were to come before a special jury drawn from the three upper property classes. Wilamowitz, *Aristoteles und Athen*, II, 217 ff. Lipsius, *op. cit.*, pp. 293 ff.

<sup>3</sup> i. 30. Cf. Sandys, *Aristotle's Constitution of Athens*, p. 142.

<sup>4</sup> Gernet and Bizos. The word *ἀποδίδωμι* is regularly used in a legal and constitutional sense of the granting or assigning of powers, prerogatives, and functions to political bodies or persons. An instructive example is found in Aristotle *Politics*

There is no reason for doubting the correctness of Demosthenes' statement: τοῦτο μόνον τὸ δικαστήριον οὐχὶ τύραννος, οὐκ ὀλιγαρχία, οὐ δημοκρατία τὰς φονικὰς δίκας ἀφέλῃσθαι τετόλμηκεν.<sup>1</sup>

By these various measures the Thirty τὸ κύρος δ' ἦν ἐν τοῖς δικασταῖς κατέλυσαν.<sup>2</sup> This purpose was effected partly by removing some of the causes of litigation by a simplification of the laws and partly by assigning to other bodies and officials some of the functions and prerogatives of the helias-tic courts. What these functions were can only be conjectured. The most prolific sources of litigation under the democracy were the δοκιμασίαι, εἵθυναί, and γραφαὶ παρανόμων. Nothing could be easier than to transfer all questions relating to the magistrates and the laws to the Areopagus which in the πάτριος πολιτεία had τὴν τῆς πολιτείας φυλακὴν.<sup>3</sup>

There are casual references to εἰσαγγελία, ἔνδειξις, φάσις, and ἀπογραφή in the time of the Thirty, but there is no indication of the tribunal before which they were brought except in one instance. During the rule of the Ten, who succeeded the Thirty for a short time, Patrocles, the king archon, met a personal enemy, Callimachus, carrying a sum of money. Patrocles at once stopped him and asserted that the money belonged to the state.<sup>4</sup> During the dispute Rhinon, one of the Ten, appeared. On hearing the details of the quarrel, he took the disputants before his colleagues, presumably for a preliminary examination. The case came before the boulé for trial in the form of a φάσις, and a verdict in favor of the treasury was rendered. Patrocles evidently acted as prose-

1275b: τούτων γὰρ ἡ πᾶσιν ἡ τισὶν ἀποδίδεται τὸ βουλευέσθαι καὶ δικάζειν. Cf. also Plato *Ion* 537c: ἐκάστη τῶν τεχνῶν ἀποδίδεται τι ὑπὸ τοῦ θεοῦ ἔργον. Other examples are cited by Frohberger, *ad loc.*, and in the appendix to his notes on the passage a full citation of the literature is given. Lipsius (*op. cit.*, pp. 41-42) accepts the older view that ἀποδίδεται means "redditum est," but regards the theory that the Thirty abolished the homicide courts as not proved. In the reign of terror "musste des Areopags Tätigkeit lahmgelegt werden." For other discussions of the passage cf. Philippi, *Der Areopag und die Epheten*, p. 266; Rauchenstein, *Philologus*, X, 604 ff.; Curtius, IV, 16.

The reading ἀποδίδεται, preferred by some editors, does not change the sense of the passage.

<sup>1</sup> xxiii. 66.

<sup>3</sup> *Ibid.*, xxv. 2.

<sup>2</sup> Aristotle *op. cit.*, xxxv.

<sup>4</sup> Isocrates xviii. 5 ff.

cutor. It was the *boulé* that tried the sycophants who were put to death in large numbers at the beginning of the rule of the Thirty. The form in which these cases were brought is not specified. It was probably *είσαγγελία*, which was a normal form of procedure against sycophants. The term *ἐνδειξις* was also used in certain cases.<sup>1</sup> Just before the overthrow of the democracy the well-organized oligarchs procured the arrest of Strombichides and other prominent democrats, charging them with plotting against the government. The senate brought them before the overawed assembly, which voted that they should be tried by a dicastery of 2,000. After the Thirty were installed in power, they had the men tried by the senate. Lysias quotes the verdict of the senate exonerating the informer Agoratus from complicity in the plot.<sup>2</sup> There is no reported case of *ἀπογραφή*, but the process is so similar to *φάσις* that it also would naturally come before the *boulé*.

The Thirty themselves exercised judicial functions. Like the democratic magistrates and boards, they conducted the preliminary investigation (*ἀνάκρισις*) and presided at the trial. One of the "new laws" gave the Thirty the right to put to death any Athenian whose name was not on the catalogue of the Three Thousand. Theramenes was first brought before the *boulé*; but when it became apparent that the senators could not be trusted to condemn him, Critias withdrew the case, struck Theramenes' name from the list of citizens, and had him condemned by the Thirty.<sup>3</sup> No doubt the Thirty were responsible for the majority of the judicial executions that made their rule a reign of terror.

No civil cases are reported. In fact, a client of Isocrates says that court sittings were suspended: *πρὸς δὲ τοῦτοις, ἀκαταστάτως ἐχόντων τῶν ἐν τῇ πόλει καὶ δικῶν οὐκ οὐσῶν τῷ μὲν οὐδὲν πλέον ἢν ἐγκαλοῦντι, κ.τ.λ.*<sup>4</sup> This statement does not

<sup>1</sup> Lofberg, *Sycophancy in Athens*, p. 92.

<sup>2</sup> Lysias xiii. 35 ff.

<sup>3</sup> Xenophon *Hellenica* ii. 3. 51.

<sup>4</sup> xxi. 7. Owing to doubts that have been cast upon the authenticity of this speech, too much weight should not be attached to the statement that there were no court sessions (*Drerup, Isocratis opera omnia*, I, cxix).

necessarily mean that there was no provision for the trial of private suits (*δίκαι*) during the whole period of the tyranny; it may simply mean that toward the end of their rule the city was distracted by civil war and the courts could not sit. This situation occasionally arose under democracy in war time. Demosthenes<sup>1</sup> cites a law of the restored democracy to the effect that *ὅποσα δ' ἐπὶ τῶν τριάκοντα ἐπράχθη ἢ δίκη ἐδικάσθη, ἢ ἰδίᾳ ἢ δημοσίᾳ, ἄκυρα εἶναι*. It is of no consequence in this connection whether the law as quoted is genuine or not, for the text of the speech shows that it had to do with the annulment of "things done in the time of the Thirty."<sup>2</sup> That *res judicatae* are included is indicated by the words *πότερον (φῆσομεν) τὰ δικαστήρια, ἃ δημοκρατουμένης τῆς πόλεως ἐκ τῶν ὁμωμοκόντων πληροῦται, ταῦτ' ἀδικήματα τοῖς ἐπὶ τῶν τριάκοντ' ἀδικεῖν*; Demosthenes' words throw no light on the composition of the tribunals under the Thirty. By implication they are called *δικαστήρια*, but at the same time they are distinguished from the democratic *δικαστήρια* recruited *ἐκ τῶν ὁμωμοκόντων*. Frohberger calls them *rechtswidrig zusammengesetzte Dikasterien*, meaning presumably "panels drawn from the Three Thousand." The measures taken to suppress sycophants suggest that the Thirty planned some sort of popular court in addition to the *boulé*, for sycophancy could flourish only where there were large courts. The Three Thousand, along with the knights, made up the court that tried and condemned the Eleusinians;<sup>3</sup> but they were not called upon to try Strombichides and other active democrats, though there was a psephism that they should be tried by a dicastery of 2,000.<sup>4</sup> The trial of the Eleusinians was a travesty of justice in which the Three Thousand were required to participate in order that they might be implicated in the crimes of the Tyrants.

Provision could have been made for the adjudication of civil suits by reverting to the pre-Solonian system under which the magistrates were empowered to give binding de-

<sup>1</sup> xxiv. 56 ff.

<sup>2</sup> *Ibid.*, 57: ὁ γοῦν νόμος οὐτοσί ἀπέπε τὰ πραχθέντα ἐπ' ἐκείνων μὴ κύρι' εἶναι.

<sup>3</sup> Xenophon *Hellenica* ii. 4. 9-10.

<sup>4</sup> Lysias xiii. 35.

cisions. This measure could have been justified as a return to the *πάτριος πολιτεία*. But there is no reference to the exercise of judicial functions by magistrates.

An expression of Lysias<sup>1</sup> suggests that arbitration was widely used under the Thirty. A client of his was one of the Three Thousand. On this ground he was challenged on his *δοκιμασία* as being anti-democratic when selected for office under the restored democracy. He maintained that his conduct had been irreproachable, though there had been plenty of opportunity for wrongdoing if he had been so disposed. For example, he had arrested no one, put no one on the list of proscribed, *οὐδὲ δίκαιαν καταδικαίτησάμενος οὐδενός*.

The implication of this statement is not only that arbitration was an important feature in litigation but that adherents of the Thirty were in the habit of interfering in the process in the interest of themselves or their friends. Public arbitration<sup>2</sup> had not yet been instituted, and it is not easy to see how there could have been any serious interference with private arbitral awards on the part of the Thirty and their friends. It is tempting to suggest that the Thirty, like Peisistratus, provided official arbitrators who, in case of failure to induce the parties to compromise, were empowered to render a binding decision. The Thirty rural Justices first appointed in 453-452 B.C. could easily have been used for this purpose.<sup>3</sup>

<sup>1</sup> xxv. 16.

<sup>2</sup> Cf. *infra*, pp. 346 ff.

<sup>3</sup> Cf. *infra*, p. 352, for speculations regarding the functions of the thirty rural Justices.

## CHAPTER XIV

### THE BOULÉ OF FIVE HUNDRED<sup>1</sup>

Cleisthenes instituted the boulé of Five Hundred, presumably before 508–507 B.C., the date of the struggle between Isagoras and Cleisthenes and the interference of the Spartan Cleomenes.<sup>2</sup> This boulé continued to be of great importance through the remainder of the sixth century and throughout the fifth century. It underwent some important changes at the time of the two oligarchic revolutions in 411 and 404 B.C. The boulé of 411 B.C., consisting of 400 members, was unique in some respects. It was the sovereign body of the state and was subject to no interference. Herein it differed from the boulé under the democracy, which acted in conjunction with the ecclesia and the heliastic courts and was not sovereign. After the downfall of the Four Hundred, the democratic boulé of Five Hundred was restored and its numbers remained unchanged under the tyranny of the Thirty. The boulé of Five Hundred under the Thirty, then, was much more like the democratic boulé than was the boulé of the Four Hundred, for it was compelled to yield to the authority of the Thirty, who were, of course, supreme. Cloché has well said that the Council of the Four Hundred is comparable to the Thirty themselves rather than to the council under the Thirty, for the Council of Four Hundred and the Thirty were each the final authority in their respective régimes.<sup>3</sup>

It has been argued that the boulé after the democratic

<sup>1</sup> In the interests of clarity and continuity it has been thought better to assemble the material on the boulé in one chapter rather than to treat it in connection with each period of reform.

<sup>2</sup> It has been assumed above, p. 189, that it was probably the new Cleisthenean boulé of Five Hundred rather than the Solonian Council of Four Hundred which rendered Cleisthenes such valuable assistance at this time. In fact, it is doubtful if the Solonian council could have been in existence at the time.

<sup>3</sup> Cloché, "Les pouvoirs de la boulè d'Athènes en 411 et en 404 avant J.-C.," *Rev. d. études grecques*, XXXVII, 412 ff. For the judicial activity of the boulé under the Four Hundred, cf. *supra*, p. 326.



restoration of 403 B.C. was decidedly inferior in power and prestige to the democratic boulé of the fifth century.<sup>1</sup> This argument is based on the supposition that the reforms of 403 B.C. in general seriously weakened the powers of the boulé. But Cloché has shown convincingly that in the fourth century the boulé had practically the same powers as in the fifth—in legislation, politics, general administration and direction of assemblies.<sup>2</sup> The boulé then appears to have been an important administrative and political body straight through its history and to have been always, with the brief exceptions of the revolutionary periods, thoroughly democratic.<sup>3</sup>

The boulé had, also, important judicial powers. Aristotle asserts that at one time the boulé had full authority to inflict penalties of imprisonment, death, and fines: ἡ δὲ βουλὴ πρότερον μὲν ἦν κυρία καὶ χρήμασιν ζημιῶσαι καὶ δῆσαι καὶ ἀποκτείνειν.<sup>4</sup> He does not, however, specify the date when it had such authority. His statement may refer only to the extensive powers which the boulé exercised under the tyranny of the Thirty and for a time subsequently. It is well known that under the Thirty many capital sentences were imposed by the boulé<sup>5</sup> and that it did not immediately cease to inflict penalties on the restoration of the democracy in 403 B.C. Soon after the overthrow of the Thirty, Archinus, in an attempt to check the alarming disregard of the amnesty, haled an offender before the boulé and had him condemned to death ἄκριτος.<sup>6</sup> Here ἄκριτος does not mean "without trial,"

<sup>1</sup> Cf. Cavaignac, "Le conseil athénien des cinq-cents," *Rev. d. cours et conférences*, 1909, pp. 230 f., who says that in the fourth century the boulé was of slight importance. It is not clear how much power he assigns to it in the fifth century. Cf. Wilamowitz, *Aristoteles und Athen*, II, 195 ff., who attributes a very considerable rôle to the fifth century boulé.

<sup>2</sup> "L'importance des pouvoirs de la boulé athénienne aux V<sup>e</sup> et IV<sup>e</sup> siècles avant J.-C.," *Rev. d. études grecques*, XXXIV (1921), 233 ff.

<sup>3</sup> Cf. Cloché, "Le conseil athénien des cinq-cents et les partis," *Rev. d. études grecques*, XXXV, 269 ff.

<sup>4</sup> *Ath. Pol.* xlv. 1.

<sup>5</sup> Cf. Lysias xiii., 38; Isocrates xvii. 42; Xen. *Hell.* ii. 3. 24 ff.; Andocides i. 115.

<sup>6</sup> Aristotle *Ath. Pol.* xl. 2.

but rather "without due process of law" and shows that the boulé was acting *ultra vires* in itself conducting the trial and inflicting such a penalty. The term ἀκριτος in the sense of "without *due* process of law" is regularly used in cases where the verdicts of the boulé were not confirmed by a heliastic court.<sup>1</sup> The boulé did not technically have the right to inflict capital penalties, although no act depriving them of such power had been passed since the overthrow of the Thirty. The Athenians assumed that on the restoration of the democracy the boulé, like other democratic bodies, would revert to the status which it had had before the revolution. But Archinus, in order to get quick action, did not hesitate to make use of the boulé just as the oligarchs had used it. Other cases of this sort may have occurred, as a story told by Aristotle, which can be treated as nothing more than an anecdote, seems to indicate. Lysimachus had been condemned to death by the boulé and had been handed over to the executioner. He was rescued by Eumelides, who maintained that no citizen should be condemned to death who had not had a hearing before a dicasterion.<sup>2</sup> The case was brought before a heliastic court, and Lysimachus was acquitted. Aristotle makes the case of Lysimachus the immediate occasion for what appears to be a re-enactment of the law restricting the punitive powers of the boulé. According to this law the power of the boulé was definitely curtailed. Henceforth, if the boulé determined that any case before them required a more severe penalty than they were empowered to inflict, they could propose a suitable penalty, but it was not effective until confirmed by a court under the presidency of the thesmothetae.<sup>3</sup>

There are difficulties in the way of determining the date at which the judicial powers of the boulé were first restricted.

<sup>1</sup> In Lysias xxii. 2 the words ὑμᾶς ("the jurors") οὐδὲν ἤττον ἡμῶν ("the boulé") γνώσεσθαι τὰ δίκαια show that the council, in proposing to put the grain-dealers to death ἀκριτοι, did not propose to act without a trial, but merely to execute them summarily without seeking confirmation of their verdict in a heliastic court.

<sup>2</sup> Aristotle *Ath. Pol.* xlv. 1.

<sup>3</sup> Aristotle *Ath. Pol.* xlv. 1.; Lipsius, *Das attische Recht*, p. 45, n. 137.

In the first place, there appears always to have been a marked tendency on the part of the *boulé* to disregard the constitutional restrictions placed upon the exercise of its judicial functions.<sup>1</sup> A client of Lysias, the prosecutor of the grain dealers in 387–386 B.C., in resisting the proposal to put the accused men to death *ἄκριτος*, expressed the fear that the *boulé* was acquiring the habit of acting *ultra vires*.<sup>2</sup> There are indications that this was not a mere rhetorical exaggeration.

In many cases, no doubt, the *boulé* felt that it could count on considerable popular support in overstepping the restrictions imposed by law. This was certainly true in the case of Archinus and, to a less extent, in the proposed illegal execution of the grain dealers. An adequate supply of grain at reasonable prices was a matter of vital importance to all Athenians. Any attempt to curtail the supply or to manipulate prices would at once arouse popular feeling to a point where summary action by the *boulé* would be readily condoned, if not demanded. And a body of 500 men, chosen by lot from the rank and file of the citizens, would respond very readily to the changing currents of public opinion. Moreover, the *boulé* ran little risk in overstepping the constitutional limits imposed on its powers. In general, the means for enforcing constitutional guarantees in Athens were far from adequate. The audit<sup>3</sup> at the end of the official year afforded opportunity for some form of redress, but the friends of the victim could scarcely hope to prosecute several hundred men for judicial murder on their audit as Lysias did

<sup>1</sup> The readiness of the *boulé* to act *ultra vires* may explain a passage in Aristophanes, which is sometimes cited to show that the *boulé* was possessed of the power to imprison a culprit in the stocks in 411 B.C., when the *Thesmophoriazousae* was presented. Mnesilochus had in disguise found his way into the celebration of the Thesmophoria. When discovered, he was put in the stocks by order of the senate, as the result of a report of his impious deed (l. 943). It is impossible to say what comic purpose could have been served by representing the *boulé* as acting *ultra vires*; but it seems hazardous, in face of considerations to the contrary, to rely on this passage as evidence that the *boulé* had at this time the right to imprison a culprit in the stocks, and that, too, without an official inquiry.

<sup>2</sup> Lysias xxiv. 2 ff. For the date, cf. Blass, *Die attische Beredsamkeit*, I, 472.

<sup>3</sup> Gilbert, *Greek Constitutional Antiquities*, p. 267.

in the case of Eratosthenes.<sup>1</sup> Perhaps the most that the members of the boulé had to fear was the loss of the crowns of honor distributed among them when they passed their audit. The plight of Lysimachus and the fate of the sycophant prosecuted by Archinus show that there was no device available to the victims similar to the Anglo-American writ of habeas corpus, or injunction, or stay of execution.

A further difficulty in determining the date of the original law restricting the powers of the boulé is presented by the probability that this law, like other ancient laws, was re-enacted, or amended, on occasion to meet the needs of a growing constitution.

Wilamowitz<sup>2</sup> puts the date of the law sometime in the fourth century; but his arguments have been so satisfactorily answered by Lipsius<sup>3</sup> that it is unnecessary to restate his position and to summarize the refutation of Lipsius. Lipsius himself put the date back into the fifth century without attempting to suggest a more exact time.

The restrictions on the power of the boulé were in force in Aristotle's day. Tracing back the history of the boulé, we find that in 387-386 B.C. they were also in force, when the boulé showed a disposition to disregard them in the case of the grain dealers.<sup>4</sup> The fact that the victim of Archinus was said to have been put to death ἀκριτος shows that in 403 B.C. there were limitations upon the punitive powers of the boulé. Naturally these limitations were in force before the rule of the Thirty. Confirmation of this is to be found in a very fragmentary inscription, quoted in full above.<sup>5</sup> The

<sup>1</sup> Lysias xii.

<sup>2</sup> *Op. cit.*, II, 195 ff.

<sup>3</sup> *Op. cit.*, p. 46, n. 142.

<sup>4</sup> Cloché, "Le conseil athénien des cinq cents et la peine de mort," *Rev. d. études grecques*, XXXIII, 36 f.

<sup>5</sup> *CIA* i. 57, quoted in full, *supra*, p. 201. Cloché (*op. cit.*, pp. 28 ff.) considers this inscription of the utmost importance in determining the date of the restriction of the boulé's powers. Gilbert (*op. cit.*, p. 277, n. 1) thinks it may refer to this event; and Lipsius (*op. cit.*, p. 45) considers it important in this connection, although he fails to date its first publication. Oehler (Pauly-Wissowa, article βουλή, pp. 1030 ff.) thinks that this inscription refers to the loss of the rights of the boulé. Wilamowitz (*op. cit.*, II, 195) considers the decree merely "die instruction des rates für den vorsitz in der volksversammlung" and believes that the boulé possessed the formal right to sentence to death all through the fifth century and into the fourth

fact that the first part of the inscription mentions the *boulé* of Five Hundred and also 500 drachmas and that the second part specifies certain matters which could be dealt with only by a full assembly of the people has led some scholars to believe that this is a decree which deprived the *boulé* of several of its important functions and transferred them to the assembly. The extant form of the law, according to the opinion of the editors, belongs to about the year 410 B.C., shortly after the overthrow of the Four Hundred. During the brief rule of the Four Hundred the *boulé* of Five Hundred ceased to exist. Thucydides<sup>1</sup> tells the story of how the Four Hundred dismissed the *boulé* after giving them the remainder of their pay for the year. After the downfall of the revolutionists a revision of the laws took place. It is doubtless to this period that the publication of the decree belongs. But some archaic touches—e.g., the use of *θῶαν* for penalty—have led scholars rather generally to believe that the inscription of 410 B.C. is a re-enactment of a much earlier decree, to specify the rights and privileges of the *boulé* and assembly on their re-establishment after the overthrow of the Four Hundred. The mention of 500 drachmas in connection with the *boulé* has led to the belief that this decree limited the punitive power of the *boulé* to the imposition of a fine of 500 drachmas.

To what period did the original publication of the decree belong? That it belongs to a period earlier than 446 B.C. is indicated by a decree relating to the settlement of Chalcis after its reduction by the Athenians in 446 B.C. The first part of the inscription deals with the form of the oath to be sworn by the Athenian senators and dicasts regarding their conduct toward the Chalcidians. The provisions of the oath are as follows:

κατὰ τὰδε τὸν ὄρκον ὁμόσαι 'Αθηναίων τὴν βουλὴν καὶ τοὺς δικαστάς·  
οὐκ ἐχσελῶ Χαλκιδέας ἐκ Χαλκίδος οὐδὲ τὴν πόλιν

century until some uncertain date between 386 and 352 B.C. Busolt-Swoboda (*Staatskunde*, II, 1046) are at pains to refute his argument, putting the restriction after 411 B.C. Busolt thinks that undoubtedly *CIA* i. 57 has reference to the revision of the laws made at that time.

<sup>1</sup> viii. 69.

οὐδὲ ἰδιώτην οὐδένα ἀτιμώσω οὐδὲ φυγῇ ζημιώσω οὐδὲ χυλλήφσομαι οὐδὲ ἀποκτενῶ οὐδὲ χρήματα ἀφαιρήσομαι ἀκρίτου οὐδενὸς ἀνευ τοῦ δήμου τοῦ Ἀθηναίων, οὐδ' ἐπιψηφίω κατὰ ἀπροσκήτου οὔτε κατὰ τοῦ κοινοῦ οὔτε κατὰ ἰδιώτου οὐδὲ ἐνός, καὶ πρεσβείαν ἐλθοῦσαν προσάχσω πρὸς βουλήν καὶ δῆμον δέκα ἡμερῶν, ὅταν πρυτανεύω, κατὰ τὸ δυνατόν. ταῦτα δὲ ἐμπεδώσω Χαλκιδεῦσιν πειθόμενοις τῷ δήμῳ τῷ Ἀθηναίων.<sup>1</sup>

For the present purpose the words of the second guaranty are of particular significance. "I shall not disfranchise any private citizen, or punish him with exile or arrest him or put him to death; nor shall I confiscate the property of anyone without trial, without the action of the Athenian people."<sup>2</sup> It cannot be maintained that the Athenian boulé, when the decree was passed, was still exercising the right to inflict penalties of death, confiscation, and disfranchisement, for it is absurd to suppose that they would continue to exercise powers at home which they bound themselves by oath to relinquish in the case of subject states. The decree must indicate, then, that the curtailment of the powers of the boulé had taken place prior to 446 B.C.<sup>3</sup> Another decree of approximately the same year likewise points to the conclusion that the limitation of the powers of the boulé had been effected before this time.<sup>4</sup> According to this decree, any encroachment on the Πελαργικόν was to be punished by a fine of 500 drachmas, the fine to be inflicted after an *eisangelia* had been brought before the boulé by the king archon. This is not conclusive evidence, but it seems more than a mere coincidence that the fine mentioned here is exactly the amount of the maximum fine to which later it is certain that the boulé was restricted.<sup>5</sup>

The time of the reforms of Ephialtes (462-461 B.C.) has been suggested as a date for the restriction of the powers of

<sup>1</sup> *CIA* i. 59; Hicks and Hill, *Greek Historical Inscriptions*, No. 40.

<sup>2</sup> For various interpretations of the different parts of this oath, cf. Robertson, *Administration of Justice in the Athenian Empire*, pp. 39 ff. Robertson shows that the second guaranty of the oath applies to the boulé.

<sup>3</sup> Robertson (*op. cit.*, p. 40) argues further that the fact that the boulé takes an oath at this time shows that the diminution of the boulé's powers could not have occurred many years before this decree was passed, and therefore must have been a part of some very recent reform. It is not unusual, however, for such a provision to appear even if the restriction had been imposed many years previously.

<sup>4</sup> Dittenberger, *Sylloge*, No. 20, line 59.

<sup>5</sup> Demosthenes xlvii. 43.

the *boulé*. But, as Cloché has pointed out,<sup>1</sup> it is unlikely that, at a time when an attempt was being made to divide the powers of the Areopagus among the *ecclesia*, *boulé*, and law courts,<sup>2</sup> another decree should be passed limiting the functions of the *boulé*.

Furthermore, a passage in Herodotus<sup>3</sup> shows that the *boulé* in 479 B.C. already referred important matters to the assembly:

τῶν δὲ βουλευτῶν Λυκίδης εἶπε γνώμην ὥς οἱ ἐδόκει ἀμεινον εἶναι δεξαμένους τὸν λόγον τὸν σφι Μουριχίδης προσφέρει ἐξενεῖται ἐς τὸν δῆμον. . . . Ἀθηναῖοι δὲ αὐτίκα δεινὸν ποιησάμενοι, οἳ τε ἐκ τῆς βουλῆς καὶ οἱ ἔξωθεν, ὥς ἐπίθοντο, περιστάντες Λυκίδην κατέλευσαν βάλλοντες.<sup>4</sup>

When Cleisthenes introduced his reforms, he organized a new *boulé*, in function presumably very like the old, but different in membership, owing to his reorganization of the tribes. He must have made the *boulé* virtually the sovereign body in the state. It was the only body that could have served his purpose. Important additional powers could scarcely be given to the Areopagus, inasmuch as it was looked upon as the oligarchic element in the state. The assembly, during the early part of Cleisthenes' activity, was not well organized. Moreover, the *boulé* had rendered Cleisthenes valuable assistance in the resistance to Isagoras and Cleomenes,<sup>5</sup> and it is natural that he should be interested in assigning to it extensive powers. It may well have been granted unrestricted authority in judicial matters. It is evident, however, that very soon after Cleisthenes started his reforms the whole tendency was to throw as much power as possible into the hands of the assembly, which naturally, with the growth of democracy, became of prime importance, as it gained political experience. Very shortly, in the year 502-501 B.C., an oath was imposed upon the *boulé*.<sup>6</sup> The fact that Aristotle, who gives few such details, singles out the oath for special mention as an important development points to some kind of reorganization in the *boulé* at this time. Aristotle says that the oath instituted in 502-501 B.C.

<sup>1</sup> *Rev. d. études grecques*, XXXIII, 31.

<sup>2</sup> ix. 5.

<sup>3</sup> Cf. *supra*, pp. 252 ff.

<sup>4</sup> Cf. Cloché, *op. cit.*, p. 32.

<sup>5</sup> *Ath. Pol.* xx. For the theory that it was his own *boulé*, cf. *supra*, p. 335.

<sup>6</sup> *Ath. Pol.* xxii.

was the one which was still in use in his own day.<sup>1</sup> There are a few notices of the content of this oath, most of them very general and concerned with promises to perform the duties of a *βουλευτής* in the best interests of the city.<sup>2</sup> But Demosthenes gives a further clause in which the members of the *boulé* swore not to imprison a man who produced the proper bail, except under certain conditions, e.g., treason, conspiracy for overthrow of the government.<sup>3</sup> Demosthenes is referring to the oath of his own day which Aristotle says was instituted by Cleisthenes.<sup>4</sup> It is noteworthy that the oath given by Demosthenes is of a negative character. Doubtless the *bouleutae* were required to bind themselves by oath to observe the restrictions imposed upon them by law. Aristotle mentions the restrictions which were put upon the *boulé* by the law which he represents as having been enacted after the affair of Lysimachus:

ὁ δὲ δῆμος ἀφείλετο τῆς βουλῆς τὸ θανατοῦν καὶ δεῖν καὶ χρήμασιν ζημιοῦν, καὶ νόμον ἔθετο, ἂν τινος ἀδικεῖν ἢ βουλή καταγνῶ ἢ ζημιώσῃ, τὰς καταγνώσεις καὶ τὰς ἐπιζημιώσεις εἰσάγειν τοὺς θεσμοθέτας εἰς τὸ δικάστηριον, καὶ ὃ τι ἂν οἱ δικάσταὶ ψηφίσωνται, τοῦτο κύριον εἶναι.<sup>5</sup>

It may plausibly be suggested that, in accordance with this law, the *boulé* swore to observe the restrictions contained therein, i.e., οὐ θανατώσω, οὐ δέσω, οὐ χρήμασιν ζημιώσω, κ.τ.λ. Some confirmation of this is found in the speech against Alcibiades attributed to Andocides, where the *boulé* is represented as swearing μηδένα μήτε ἐξελᾶν μήτε δῆσειν μήτε ἀποκτενεῖν ἄκριτον.<sup>6</sup> Another oath of the same negative char-

<sup>1</sup> Aristotle's statement is doubtless substantially correct. There is record of an addition to the oath after the amnesty of 403 B.C. (Andocides I. 91): καὶ οὐ δέξομαι ἐνδεῖξιν οὐδὲ ἀπαγωγὴν ἕνεκα τῶν πρότερον γεγενημένων, πλὴν τῶν φυγόντων.

<sup>2</sup> Xen. *Mem.* i. 1.18; Lysias xxxi. 1; Demosthenes lix. 4.

<sup>3</sup> Demosthenes xxiv. 144, 148.

<sup>4</sup> In attributing the institution of the oath to Solon, Demosthenes is following the regular practice of the orators of attributing all old laws to Solon. Cf. *supra*, 152.

<sup>5</sup> Aristotle *Ath. Pol.* xlv. 1.

<sup>6</sup> Andocides iv. 3. This speech admittedly was not composed by Andocides. Blass (*Die attische Beredsamkeit*, I, 338) has suggested that it may have been composed by a sophist of the fourth century. Cf. Jebb, *Attic Orators*, I, 132 ff. While the writer is in error in attributing such an oath to the *demos*, he may still be correct in the elements of the oath of the *boulé*.



acter is the oath in the decree of settlement with Chalcis, which has been quoted above. There the provisions are all negative and are somewhat the same as those just suggested. The Chalcidians are assured of the enjoyment of life, liberty, and property. It is possible that the Athenians were extending to the Chalcidians the same rights which they gave to their own citizens and that the oath given here is modeled on the bouleutic oath as instituted by Cleisthenes.<sup>1</sup>

Cloch  argues convincingly that the original enactment of the decree which deprived the boul  of power and transferred it to the assembly (*CIA* i. 57) belongs to the period between the beginning of Cleisthenes' activity and the Persian wars, and may perhaps belong close to the year 502-501 B.C.<sup>2</sup> His arguments, both as to the date and as to the purpose of the decree, are undoubtedly correct. He did not, however, see the full significance of the oath which was introduced by Cleisthenes and its relation to the oath of the boul  in Aristotle's day. The evidence of this oath, taken in conjunction with the enactment at this time of the decree recorded in *CIA* i. 57 indicates that to the year 502-501 B.C. belongs the limitation of the punitive powers of the boul . Very soon after its establishment, then, the boul  of Five Hundred was restricted in its right of inflicting penalties to the imposition of a fine of 500 drachmas and lost its right to inflict sentences of death, imprisonment (except in certain specified cases),<sup>3</sup> and confiscation of property.

There were, then, three periods at which laws were enacted which restricted the punitive powers of the boul : (1) soon after the beginning of Cleisthenes' reforms, when Cleisthenes was interested in transferring as much power as possible to the assembly, the importance of which was increasing in proportion to the growth of democracy; (2) after the down-

<sup>1</sup> In the oath of the Chalcis decree there occurs the qualification * νευ τοῦ δήμου τοῦ Ἀθηναίων*, which is doubtless explanatory of *ἀκρίτου*.

<sup>2</sup> Cloch , *Rev. d.  tudes grecques*, XXXIII, 28 ff.

<sup>3</sup> Cf. Andocides i. 93: *  γάρ νόμος οὕτως εἶχε κυρίαν εἶναι τήν βουλήν,  ς  ν πριάμενος τέλος μ  καταβάλλη, δεῖν εἰς τ   ύλον*. Cf. Aristotle *Ath. Pol.* xlviii. 1. Special authority might at any time be conferred upon the boul  making it *αὐτοκράτωρ* for certain purposes. Cf. Andocides i. 15.

fall of the Four Hundred in 410 B.C., for the purpose of defining the rights of the resuscitated boulé;<sup>1</sup> and (3) sometime between the restoration of democracy after the downfall of the Thirty and the Peace of Antalcidas,<sup>2</sup> in order to restrain the boulé by law from action such as it had taken in the case of Archinus.

<sup>1</sup> Cloché, *op. cit.*, pp. 16 ff., discusses very interestingly several cases in which the boulé, after the downfall of the Four Hundred, did not render sentences of death and in which they would almost certainly have done so if they had been so empowered. The cases are those of Antiphon (*X Oratorum vitae* 833 E); the generals after Arginusae (Xen. *Hell.* i. 7. 3 ff.); and Cleophon (Lysias xxx. 10 ff. and xiii. 8 ff.). Apparently the boulé obeyed pretty consistently the decree set forth in *CIA* i. 57.

<sup>2</sup> Cloché, *op. cit.*, pp. 39 ff., thinks that the boulé really retained for some time the powers which it assumed under the Thirty, but had definitely been deprived of them by the time of the Peace of Antalcides (387 B.C.). This latter argument he substantiates by the speech of Lysias against the corn-dealers.

## CHAPTER XV

### THE JUDICIAL SYSTEM IN THE FOURTH CENTURY

One of the most important changes made in the Athenian judicial system upon the restoration of democracy in 403 B.C. was the substitution of the Forty for the thirty circuit judges. It is to be inferred from Aristotle that they did not, like the Thirty, go on circuit, but held court in Athens.<sup>1</sup> They were elected by lot, four from each tribe. Most of the civil cases involving citizens were included in their jurisdiction.<sup>2</sup> The case was entered with the four representatives of the defendant's tribe. If the amount at issue was less than 10 drachmas, they, like the *apodektae*, had the right to render a final judgment. Otherwise the case was referred to one of the public arbitrators, who were closely associated with the Forty.

All men in their sixtieth year, unless they held another office or were abroad, had to serve as arbitrators, on pain of being deprived of their civil rights.<sup>3</sup> There was undoubtedly an official list of arbitrators, as such, made out for each year. The regular military roster for the forty-second year of service would not suffice. Those who were legally exempt from service as arbitrators had to be stricken off. Like the senate, the Forty, and other bodies and boards, they were divided into ten groups to represent the tribes; but in assigning arbitrators to different tribal groups, no attention was paid to their tribal affiliations.<sup>4</sup> Consequently representatives from several different tribes might be included in

<sup>1</sup> Aristotle *Ath. Pol.* liii. 1. Cf. Lipsius, *op. cit.*, p. 82.

<sup>2</sup> Bonner, "The Jurisdiction of Athenian Arbitrators," *Class. Phil.*, II, 407 ff.

<sup>3</sup> Aristotle, *op. cit.*, liii. 4, 5.

<sup>4</sup> In an arbitration between Demosthenes of the tribe Pandionis and Meidias of the tribe Erechtheis, Straton of the tribe Aeantis was the arbitrator. Demosthenes xxi. 68, 83. Cf. Gilbert, *Greek Constitutional Antiquities*, p. 389.

the same group. The reason for this departure from normal practice is obvious. In any given group of men there would inevitably be an unequal distribution among the tribes. That this was true of the arbitrators appears from a list of one hundred and three preserved in an inscription in which the tribal representatives range from three to sixteen.<sup>1</sup> The natural thing to do under these circumstances was to distribute the arbitrators as evenly as possible in ten sections without regard to their tribes.

The intimate relationship existing between the Forty and the arbitrators at once suggests that the Forty made up the original list of arbitrators and divided them into sections. Aristotle's words bear out the suggestion with regard to the original list: τὸν δὲ τελευταῖον τῶν ἐπωνύμων λαβόντες οἱ τετταράκοντα διανέμουσιν αὐτοῖς τὰς διαίτας καὶ ἐπικληροῦσιν ὡς ἕκαστος διαιτῇσιν. Lipsius<sup>2</sup> finds in διανέμουσιν reference to the section divisions. But there is no need to take, as he does, the words διανέμουσιν and ἐπικληροῦσιν as referring to different actions. The term διανέμουσιν indicates the act and ἐπικληροῦσιν the manner in which it was done. Kenyon's translation brings this out: "Then the Forty take the last of the Eponymi of the years of service and assign the arbitrations to the persons belonging to that year, casting lots to determine which arbitrations each shall undertake."

The arbitrators sat as a court under a chairman, ὁ πρυτανεύων, to try individual arbitrators for malfeasance in office.<sup>3</sup> The penalty was loss of civil rights. The sentence, according to Aristotle, was subject to appeal.<sup>4</sup> But as Demosthenes tells the story of the conviction of Straton, a pub-

<sup>1</sup> CIA ii. 943.

<sup>2</sup> *Op. cit.*, p. 227, n. 29.

<sup>3</sup> Aristotle *op. cit.*, liii. 6. Cf. Demosthenes xxi. 86, for the designation of the chairman as ὁ πρυτανεύων.

<sup>4</sup> Goodell, "Aristotle on the Public Arbitrators," *Amer. Jour. of Philol.*, XII, 322, on the basis of Demosthenes xxi. 87, supposed that the verdict of the arbitrators was final. He accounted for the disagreement between Demosthenes and Aristotle by supposing a change in the law was made between 349, when *Demosthenes v. Meidias* (cf. Goodwin's edition of the *Meidias*, p. 134) was tried, and 328-325, the date of the *Politeia* of Aristotle. But this view is based on a misinterpretation of καθάπαξ ἄτιμος γέγονεν. Cf. Goodwin, *ad loc.*

lic arbitrator, it might seem at first sight that the verdict of arbitrators was final. But Demosthenes, in his anxiety to find fault with Meidias and to suggest that the board of arbitrators was acting illegally in overlooking Meidias' failure to register a witness to the summons to Straton, passes over in silence the fact that an appeal was duly taken and denied.

The substitution of the Forty for the thirty circuit judges was one of the early acts of the restored democracy. The close relationship of the arbitrators to the Forty indicates that the two bodies were organized about the same time, if not by the same law. In the early nineteenth century the prevailing opinion seems to have been that the arbitrators were instituted in the archonship of Eucleides.<sup>1</sup> No indisputable reference to public arbitration occurs before Eucleides. A technical legal phrase—*μη οὔσας δίδωκειν*—always used of appeals from an arbitrator's award rendered in default, occurs in a speech of Lysias. The date was almost certainly 401 B.C.<sup>2</sup> A law dealing with arbitration is mentioned in another speech of Lysias. It is a mere fragment quoted by Dionysius to illustrate a point of style. It is impossible to date it; but in any event it is later than 403 B.C., when Lysias at the audit of Eratosthenes delivered his first forensic speech.<sup>3</sup> His experience on this occasion seems to have turned his attention to the writing of speeches as a means of recouping his fortunes. The fragment<sup>4</sup> in question deals with a suit instituted by Archebiades to recover a sum of money (*περὶ τοῦ χρέως*). The defendant, who was young and inexperienced, claimed that he had made every effort to

<sup>1</sup> Meier, *Die Privatschiedsrichter und die öffentlichen Diaeteten Athens* (1846), pp. 28-29; Cf. Schoemann, *Die Verfassungsgeschichte Athens nach Grottes "History of Greece"* (1854), p. 44; Pischinger, *De arbitris Atheniensium publicis* (1895), p. 49.

<sup>2</sup> Lysias xxxii. 2. Jebb (*op. cit.*, I, 294) says "probably in 400 B.C." Blass (*op. cit.*, I, 647), "wahrscheinlich 401." Thalheim (Teubner text of Lysias) agrees with Blass.

<sup>3</sup> The earliest of Lysias' extant speeches is *Lysias v. Eratosthenes*, delivered in 403 B.C. (Jebb, *op. cit.*, I, 150). The only speech in the Lysias collection earlier than the rule of the Thirty is xx, which belongs to 410 or 409. It is not generally regarded as genuine. Cf. Blass, *op. cit.*, I, 503.

<sup>4</sup> *Lysias Frag. xix* (Teubner Edition).

effect an amicable settlement but that Archebiades constantly refused either to lay the matter before mutual friends or *διαίταν ἐπιτρέψαι ἕως ὑμεῖς τὸν νόμον τὸν περὶ τῶν διαιτητῶν ἔθεσθε*. The phrase *διαίταν ἐπιτρέψαι* shows that the defendant had in mind private or optional arbitration in which the parties took the initiative (*ἐπέτρεψαν τῷ δέινῳ*) and not public arbitration in which the Forty took the initiative (*παρεδίδουσιν τοῖς διαιτηταῖς*). It is evident that when the matter first came up the only means of settlement out of court was a conference of mutual friends or some kind of optional arbitration, private or public. But before the case came to trial, a law was passed making arbitration obligatory, i.e., the kind of public arbitration described by Aristotle.<sup>1</sup> This is the kind of arbitration to which the case was finally submitted, as is shown by the fact that it was brought before a heliastic court on appeal. Schoemann<sup>2</sup> in 1854 argued that the law here mentioned did not establish public arbitration, but rather extended its scope by increasing the amount in dispute that could be referred to arbitration. The assumption underlying Schoemann's theory is that cases involving smaller amounts were the most suitable for arbitration. But there is no indication that the Athenians ever held this view. In fact, in the system described by Aristotle it is only the smaller cases that were exempted from arbitration. Claims involving 10 drachmas or less were settled by the Forty themselves. The reason for this exemption was no doubt to prevent these two-penny-half-penny cases from finding their way into a heliastic court by way of appeal. No possible consideration could exclude a case from arbitration by reason of the large amount of money involved. On the contrary, the larger the amount, the more desirable it would seem to effect a settlement out of court. From the earliest times the Greeks were constantly submitting their differences to arbitration without regard to the amount of money involved. The willingness to submit a case to arbitration is a commonplace in the orators. Phormio and his litigious stepson, Apollodorus, arbitrated claims aggregating

<sup>1</sup> *Ath. Pol.* liii.

<sup>2</sup> *Op. cit.*, pp. 44 ff.

3,000 drachmas.<sup>1</sup> And Demosthenes was willing to arbitrate his claims against his guardian Aphobus. The case went to trial, and the jury awarded Demosthenes<sup>2</sup> 10 talents. In public arbitration neither party ran any risk of prejudicing his rights. If the settlement proposed by the arbitrator was agreeable to both parties, well and good. If not, it could be appealed. The case at once resumed its original status. There seems to have been no prejudice against such appeals.<sup>3</sup>

There is even less justification for the theory that the law in question was amended so as to include the kind of action entered by Archebiades. He sought to recover a sum of money which he claimed was owed him by the deceased father of the defendant. No cases are more suited to arbitration than those concerning debts and damages. The claim of Archebiades is just the sort of case that one would expect to find included in the simplest measure of arbitration. There is good reason for supposing that the law mentioned in the Archebiades case was the law that established the type of public arbitration described by Aristotle. The speech cannot be dated, but it is not earlier than the archonship of Eucleides. The Diogeiton case<sup>4</sup> which has a definite reference to public arbitration is not later than 400 B.C. Consequently, the institution of public arbitration falls between 403 and 400, as Meier and most of his contemporaries believed.<sup>5</sup>

Schoemann was the first to question seriously Meier's view. His views in favor of a pre-Eucleidean date for the institution of public arbitration commended themselves to other scholars, chiefly because of the mention of *διαίτας* by Andocides.<sup>6</sup> He cites a law enacted by the restored democracy as follows: *τὰς δὲ δίκας καὶ τὰς διαίτας κυρίας εἶναι ὁπόσαι ἐν δημοκρατουμένῃ τῇ πόλει ἐγένοντο*. The current view is that this law reaffirmed both public and private awards.

<sup>1</sup> Demosthenes xxxvi. 14-16.

<sup>2</sup> xxvii. 1. *X Oratorum vitae*, 844 D.

<sup>3</sup> For casual references to arbitrations that were appealed, cf. Demosthenes xxxix. 37 and xlix. 19. Cf. lvii. 6 for a defence of an appeal.

<sup>4</sup> Lysias xxxii. 2.

<sup>5</sup> Cf. Schoemann, *op. cit.*, p. 44.

<sup>6</sup> i. 87.

Schoemann himself did not use or even mention the law, though he must have been familiar with it. Neither does Meier refer to it. The reason for their failure to mention it is not far to seek.<sup>1</sup> They realized that, since *διαίτας* might very well refer only to private arbitration, the passage is inconclusive and cannot properly be cited in this connection.

But in spite of the lack of any definite evidence for the existence of public arbitration in the fifth century, there is a persistent notion that the government must have taken some steps to facilitate recourse to arbitration as a means of relieving the congestion of the courts. Schoemann accounts for the absence of any reference to public arbitration by pointing out that the extant fifth-century law cases were not subject to arbitration.<sup>2</sup> Any measure of public arbitration introduced in the age of Pericles would naturally be associated with the thirty rural justices. Nothing definite is known about the jurisdiction and procedure of this board.<sup>3</sup> Presumably, they handled the bulk of the civil cases. These are the cases that were best suited for arbitration. Aristotle<sup>4</sup> definitely associates the thirty rural justices with the Peisistratēan justices. "In the archonship of Lysicrates, the thirty 'local justices,' as they were called, were re-established" (*πάλιν κατέστησαν*). The members of both boards went on circuit. In recording the institution of the Forty in a later

<sup>1</sup> Schoemann would scarcely have ventured to say (*op. cit.*, p. 47) "Der Diateten geschieht bei den älteren Rednern keine Erwähnung vor Lysias" without scanning the speeches of Andocides closely enough to note the mention of *διαίτας* in i. 87.

<sup>2</sup> *Op. cit.*, p. 47. This is quite true, but it is not so easy to account for Aristophanes' failure to refer to arbitration among his constant references to litigation and courts. Socrates is represented as saying in the *Apology*, 32 B, that he never held any office but that of senator. If this was a serious statement of fact rather than a device to refer to his stand in face of popular opposition, it might serve to show that Socrates had never acted as a *διαίτητής*, though he had passed his sixtieth year.

<sup>3</sup> De Sanctis (*op. cit.*, pp. 135 f.) has made an attempt to reconstruct the range of cases that came before the Thirty. They were appointed to relieve the thesmothetae of the most of their civil cases. Apart from the monthly suits and inheritance and other family matters that belonged to the jurisdiction of the archon, the Thirty, like their successors, the Forty, had jurisdiction over the bulk of the civil cases. Cf. Keil, *Anonymus Argentinensis*, pp. 234 ff.; Gilbert, *op. cit.*, p. 157.

<sup>4</sup> *Ath. Pol.* xxvi. 3; liii. 1.



chapter, Aristotle says: "Formerly they were thirty in number, and they went on circuit in the demes to hear cases" (*περιὺντες ἐδίκαζον*). Under the rule of Peisistratus there was no difficulty in empowering these itinerant judges to render a binding verdict on the merits of the case, if they failed to persuade the disputants to agree to an equitable settlement. But in fifth-century Athens democracy would scarcely have tolerated the return to final verdicts rendered by magistrates beyond the limit of 10 drachmas. Nor is it to be supposed that the words *περιὺντες ἐδίκαζον* mean that the Thirty, sitting as a body in different centers, held court and rendered judgments as authoritative as those of the individual heliastic courts. Such a system would soon have destroyed the supremacy of the dicasts.

On the basis of inherent probabilities and considerations drawn from the proceedings of the Peisistratean justices and those of the Forty, the following reconstruction of the procedure of the Thirty is offered as a possible explanation of the situation in the Archebiades case. Like their predecessors, they exercised arbitral functions; and like their successors, they prepared cases for hearing and presided at the trial by a heliastic court. Their arbitral functions explain their going on circuit. We may suppose that the individual members of the board appeared at regular intervals in the centers included in their circuits.

When a case was entered, either the plaintiff or the defendant could challenge his opponent to submit the matter to the official (one of the thirty rural justices) to arbitrate just as they might have submitted it to a private arbitrator agreed upon. The advantage lay in the fact that the possibility of arbitration was brought to the attention of every litigant. A suitable arbitrator was provided. All trouble of selecting a man agreeable to both parties was avoided. If a challenge to arbitrate was accepted, the official heard the arguments and the evidence and endeavored to secure a settlement acceptable to both parties. If he succeeded, his award was recorded as final. If the challenge was not accepted, the official held an *ἀνάκρισις* and sent the case up for trial.

When Archebiades brought suit, the defendant challenged him to submit the case to the official for arbitration (*ἐπιτρέψαι δίαιταν*). This challenge was refused, but before the case came up for trial the νόμος περὶ τῶν διαιτητῶν was passed and the case was referred to a public arbitrator by the Forty, according to the terms of the new law. The award was appealed, and the case came before a heliastic court. The speech was written by Lysias for the defendant.

If νόμος περὶ τῶν διαιτητῶν is the correct title of the statute cited in the Archebiades case, it is evident that the Forty and the arbitrators were not instituted by the same law. The case must have come up in the interval between the enactment of the two laws.

The public arbitrators, according to Aristotle, sealed the written evidence of the witnesses and sent it to the Forty in case of an appeal. Demosthenes<sup>1</sup> cites a law requiring all testimonial evidence to be presented in court in the form of affidavits. The witnesses were required, except in certain specified cases, to be present in court to acknowledge their testimony. There was no provision for cross-examination at any stage of the proceedings. There is abundant evidence that this law was not in force in the fifth century or the early years of the fourth. Neither Andocides, Isocrates, nor Lysias ever called upon the clerk to read an affidavit, though they had other documents read in court by the clerk: μάρτυρας ὑμῖν παρέξομαι, ἀναγνωσθήσονται δὲ ὑμῖν καὶ αὐταὶ αἱ ἀπογραφαί. On occasion they use language that shows beyond doubt that their witnesses were giving oral testimony. "You have heard the witnesses."<sup>2</sup> "Look at the jurors and testify whether I speak the truth."<sup>3</sup> "Call the witnesses. They will talk to you as long as you wish."<sup>4</sup> "Those who were

<sup>1</sup> xlv. 44: ὁ νόμος μαρτυρεῖν ἐν γραμματεῖῳ κελεύει ἵνα μὴτ' ἀφελεῖν ἐξῇ μῆτε προσθεῖναι τοῖς γεγραμμένοις μηδέν.

<sup>2</sup> Lysias xxxii. 28:

καὶ μοι ἀνάβητε τούτων μάρτυρες.

<ΜΑΡΤΤΡΕΣ>

τῶν μὲν μαρτύρων ἀκηκόατε.

<sup>3</sup> Andocides i. 18: βλέπετε εἰς τούτους (sc. δικαστάς), καὶ μαρτυρεῖτε εἰ ἀληθῆ λέγω.

<sup>4</sup> *Ibid.*, p. 69: αὐτοὺς κάλει . . . μέχρι τούτου ἀναβήσονται καὶ λέξουσιν ὑμῖν, ὥς ἂν ἀκροᾶσθαι βούλησθε.

present at the transactions and know them better than I will testify and give you an account."<sup>1</sup> In these instances the witnesses evidently told their stories quite informally in their own way. But evidence might also be elicited by questions. Andocides in his speech on the Mysteries<sup>2</sup> includes a record of one of these interrogations:

Were you a commissioner, Diognetus, when Pythonicus impeached Alcibiades in the assembly?

I was.

Do you know that Andromachus gave information regarding what took place in the house of Polyton?

I do.

Are these the names of the men against whom he informed?

They are.

No doubt this was the regular practice, particularly when a litigant was using a speech prepared for him by a professional speech-writer. Only in this way could an inexperienced speaker have kept any control of the situation. It is also possible that individual jurors may have asked occasional questions.

In the burlesque trial of the dog in the *Wasps* of Aristophanes<sup>3</sup> the witnesses are called up and questioned. There is no reason to suspect that Aristophanes is not conforming to the current practice.

Good sir, listen to the witnesses. Cheese grater, take the stand and speak out. You were in charge of the commissariat? Now answer plainly. Did you not grate what you got for the soldiers? (*The witness nods assent.*)

One cannot but wonder why the Athenians required evidence to be reduced to writing. Affidavits are much inferior to oral evidence elicited by means of question and answer even without cross-examination. Witnesses can be induced to subscribe to an affidavit containing statements which they would be unwilling to make in answer to questions or to stick to in the face of a severe cross-examination. But affidavits take less time than rambling statements or interrogations. Time-saving meant considerable saving of money

<sup>1</sup> Lysias xvii. 2: οἱ μᾶλλον τε ἐμοῦ εἰδότες καὶ παραγεγεννημένοι οἷς ἐκεῖνος ἔπραττε διηγῶνται ὑμῖν καὶ μαρτυρῶνται.

<sup>2</sup> i. 14.

<sup>3</sup> 962 ff.

in jury fees. This aspect of the matter would have appealed to Athens in the fourth century. The plaintiff in *Apollo-dorus v. Stephanus*, a perjury case, suggests a reason for the requirement; he says that the law required written evidence so that testimony could not be changed.<sup>1</sup> This cannot be taken to mean that the sole purpose of the provision was to facilitate convictions for perjury, for it was never applied to the homicide courts,<sup>2</sup> where the consequences of perjury were likely to be more serious, as a client of Antiphon intimates.<sup>3</sup> In modern practice, evidence is reduced to writing primarily for purposes of appeal. In Athens appeals from an arbitrator's award were based almost entirely upon affidavits presented at the arbitration. Only in exceptional cases was new evidence permitted.<sup>4</sup> Accordingly it might be supposed that the original purpose of the law was to insure that appeals should be based substantially upon the evidence presented at the original trial. But, it appears, evidence was presented orally for years after the introduction of arbitration.<sup>5</sup> None of these reasons furnishes an adequate motive for so great a change.

Leisi<sup>6</sup> has suggested that the innovation was in the first place due to individual litigants who found it to their advantage to have an exact record of what a witness was willing to testify. He advances this theory without attempting to show just why the practice might have appealed to litigants. A good reason for having evidence reduced to writing may be found in the needs of the professional speech-writer. As a rule his services were not confined to writing a suitable speech.<sup>7</sup> He had to familiarize himself with the evidence available to support his client's claim. Quite apart from the convenience to the speech-writer of having a memorandum

<sup>1</sup> Demosthenes xlv. 44, quoted in note 1, p. 353.

<sup>2</sup> Evidence was always presented orally in the homicide courts. Bonner, "Evidence in the Areopagus," *Class. Phil.*, VII, 450.

Antiphon v. 95.

<sup>4</sup> Bonner, *Evidence in Athenian Courts*, p. 55.

<sup>5</sup> Arbitration was introduced not earlier than 403 B.C., and written evidence in 378-377. Cf. *infra*, p. 362.

<sup>6</sup> *Der Zeuge im attischen Recht*, p. 87.

<sup>7</sup> Bonner, *Lawyers and Litigants in Ancient Athens*, pp. 213 ff.

of the available testimony to use in composing the speech, it must soon have become apparent that the inexperienced litigant found difficulty in eliciting the pertinent facts from his witnesses by interrogation, or in controlling them if they were allowed to speak freely. Even to the trained modern lawyer, the examination of witnesses still presents grave difficulties. Here is an adequate motive for introducing written depositions. It would be an easy matter for the speech-writer to furnish his client with a transcript of the testimony which he had elicited from the witness, for the clerk to read along with the documentary evidence. As the witness would be present to acknowledge the evidence, there could be no serious objection to the practice.

There is no need to suppose that a law was needed to permit a man to ask the clerk to read a transcript of what a witness stood ready to acknowledge as his evidence. It was not a serious innovation. But once the practice was established, its obvious advantages would immediately appeal to the public.<sup>1</sup> It facilitated proof of perjury by relieving the plaintiff of the necessity of proving what the witness said. His written deposition was ready to hand. He had only to prove that it was false. In arbitration it insured that the appeal from an arbitrator's award should be based substantially upon the same evidence. And incidentally, it shortened court proceedings. This seems a much simpler way of explaining the introduction of written evidence than to suppose that some reformer interested in court procedure worked it out independently of current practice and had it enacted into law. Ancient law-making, particularly in the matter of procedure, is more often than we suspect a record or modification of existing practice rather than an innovation. It is plain from Demosthenes' statement that the law required evidence to be in writing. Legislation would be necessary to enforce the practice, if not to permit it. Whether it was first required in arbitration and then extended to other cases

<sup>1</sup> Its disadvantages would not be so marked under the Athenian system, in which evidence played a comparatively subordinate rôle. Cf. Bonner, *Evidence in Athenian Courts*, pp. 30 ff.

is not known. The practice was never extended to homicide cases.

Opinions vary regarding the date of the law requiring evidence to be reduced to writing. This is to be expected. The only available data for reaching a conclusion are the formulas used in introducing testimony in court. These must be used with great care because they are often suited to either oral or written testimony. Witnesses were always required to be present in court whether the evidence was presented orally or in writing. The presence of the witnesses furnished a simple and satisfactory means of guaranteeing the authenticity of the depositions read. Incidentally, the jurors were afforded an opportunity to form an impression of the trustworthiness of the witnesses. It seems likely that the witnesses, whether giving oral testimony or acknowledging their depositions, were expected to face the jurors.<sup>1</sup> Under these circumstances it is obvious that a promise to produce witnesses (*μάρτυρας παρέξομαι*) or a call for them to come forward (*ἀνάβηθι*) in itself proves nothing. The only absolutely sure indication of the use of oral testimony is the occurrence of a word that shows that the witness talked, e.g., *λέγω*, *διηγέομαι*, and under some circumstances *μαρτυρέω*. On the other hand, there is no absolute certainty of written evidence unless *ἀναγιγνώσκω* or *μαρτυρία* occurs. Between these two extremes there is considerable latitude for differences of opinion regarding the import of a given formula.

Demosthenes cites the law requiring written depositions in a speech delivered about 350 B.C.,<sup>2</sup> but his own use of written testimony in his litigation against his guardians shows that the law was in force at least in 364.<sup>3</sup> There is nowhere any hint or suggestion of written depositions in any of the speeches of Lysias. None of them is dated later than 380. But the latest reliable reference to oral evidence is the formula, "Come forward and give your evidence" (*ἀνάβηθι*

<sup>1</sup> Andocides i. 18, quoted in note 3, *supra*, p. 353.

<sup>2</sup> Paley and Sandys, *Select Private Orations of Demosthenes*, II, xxix (2d. ed.).

<sup>3</sup> Demosthenes xxvii. For the date, cf. Schaefer, *Demosthenes und seine Zeit*, I, 288 (2d. ed.).

καὶ μαρτύρησον), which occurs in a speech of Lysias delivered between 392 and 389.<sup>1</sup> The earliest mention of written testimony, on the other hand, occurs in a speech of Isaeus, καὶ μοι ἀνάγνωθι τὴν μαρτυρίαν,<sup>2</sup> delivered between 392 and 387.<sup>3</sup> Leisi concludes, "Also um 390 herum müsste die Aenderung eingetreten sein." "Aenderung" refers to the beginning of the voluntary use of written evidence. He rightly believes that the practice of using written depositions instead of oral testimony was initiated by litigants for their own convenience. "Allmählich mochte es sich für die Parteien als praktisch erweisen, den Wortlaut der Zeugnisse schriftlich zu fixieren, um das Plädoyer ganz genau auf sie einrichten zu können und vor nachteiligen Äusserungen besser geschützt zu sein." Regarding the date of the law which made the practice compulsory, he does not commit himself. "Ob zuerst noch beide Modalitäten neben einander bestanden, oder ob das schriftliche Verfahren sogleich gesetzlich vorgeschrieben wurde, ist nicht zu entscheiden."<sup>4</sup>

The year 390 B.C. at all events is too early a date for the law. It was not in force during the professional career of Lysias, which came to an end about 380. In his latest datable speech, x, which Blass<sup>5</sup> puts in 384-383, there is no unmistakable reference to written evidence. The same is true of the other two speeches that were delivered after 390.<sup>6</sup> Nor is there any sure indication of written depositions in the first and tenth orations of Isaeus, which are amongst his first efforts. It may be objected that the formulas introducing testimony in these five speeches are neutral, because they

<sup>1</sup> Lysias xvi. 8.

<sup>2</sup> Isaeus v. 3.

<sup>3</sup> Thalheim, in his introduction to his edition of Isaeus (Teubner), p. xxxii, puts it between 393 and 387 B.C.; Blass, *Attische Beredsamkeit*, II, 544, prefers 389. Benseler, *De hiatu in oratoribus Atticis*, pp. 185 ff., argued that the battle referred to in Sections 6 and 42 was that of Cnidus in 394 B.C. and that the speech was delivered in 372. Jebb (*op. cit.*, II, 351) is inclined to the same view but admits that 390 is the more probable date. Wyse (*The Speeches of Isaeus*, p. 405) prefers the earlier date.

<sup>4</sup> Leisi, *Der Zeuge im attischen Recht*, p. 87.

<sup>5</sup> *Op. cit.*, I, 602.

<sup>6</sup> xix in 387 B.C.; xxii in 387-386 B.C. Cf. Blass, *op. cit.*, pp. 533, 472. In xxii. 9 the Teubner and Oxford editors print ΜΑΡΤΥΡΙΑ. But the text is uncertain. Van Herwerden prints ΜΑΡΤΥΣ.

might conceivably be used of either type of evidence. But in this connection a comparison with the practice of Demosthenes and his contemporaries in presenting evidence is instructive. In every one of the forensic speeches of this period in which testimonial evidence was introduced, there are unmistakable references to written depositions. The absence of similar references in the five orations of Lysias and Isaeus can scarcely be accidental. The inference that written depositions were not required by law in the period to which these speeches belong seems justified. Two of them cannot be dated with any degree of certainty, but they are all later than 390 B.C. Consequently, 390 cannot be accepted as the date of the law requiring written evidence.

In seeking to determine more closely the date of the law, the most serious difficulty is encountered in dating the three speeches of Isaeus that are involved in the problem. The fifth oration, which contains an unmistakable reference to written evidence, is certainly earlier than the tenth and probably earlier than the first.<sup>1</sup> Neither of these speeches contains any hint of written evidence. Thalheim<sup>2</sup> proposed an attractive solution of the difficulty. The passage referring to written evidence in the fifth oration is as follows:

καὶ μοι ἀνάγνωθι τὴν ἀντωμοσίαν.

#### ΑΝΤΩΜΟΣΙΑ

καὶ μάρτυρας ὑμῖν παρέξομαι . . . καὶ μοι ἀνάγνωθι τὴν μαρτυρίαν.

#### ΜΑΡΤΥΡΙΑ.

τῶν μὲν μαρτύρων ἀκηκόατε.<sup>3</sup>

<sup>1</sup> The first oration presents most difficulties in the matter of dating. Benseler (*op. cit.*, p. 192) placed it in the first period, after 360 B.C., on the basis of the marked avoidance of hiatus. Blass (*op. cit.*, II, 531) accepts Benseler's arguments. Jebb (*op. cit.*, II, 320), while expressing some doubts about this method of dating the speeches of Isaeus, agrees with Benseler. But Wyse (*op. cit.*, p. 179) is quite pronounced in his criticism of the method of Benseler. He points out that hiatus is carefully avoided in the eighth oration, which belongs between 387-363, while no pains were taken to avoid it in the second oration, which belongs to the later period. There is, then, good ground for the view of Thalheim that the first oration belongs to the early years of the orator. The tenth oration belongs to the period of the Theban War, 378-371.

<sup>2</sup> Review of Bonner's *Evidence in Athenian Courts* in *Berliner Philologische Wochenschrift*, 1905, p. 1575.

<sup>3</sup> Isaeus v. 2.



After promising to produce *witnesses*, the speaker calls for the reading of *one* affidavit. It is also to be noted that the expression "You have heard the witnesses" (τῶν μὲν μαρτύρων ἀκηκόατε) is more appropriate to oral than to written testimony. For these reasons Thalheim proposed to strike out the words καὶ μοι ἀνάγνωθι τὴν μαρτυρίαν as an interpolation. The source of the interpolation he found in the words of the preceding section, καὶ μοι ἀνάγνωθι τὴν ἀντωμοσίαν, which appear again at the end of the fourth section. Having thus disposed of the only reference to written evidence in the speech, he arrives at the date 375 B.C. by striking an average between the extreme possible dates for the tenth oration, 378–371.

Recent investigations have shown that the archonship of Nausinicus (378–377) bids fair to rival the archonship of Euclides as a year of reform. In a study entitled "Oral and Written Pleading in Athenian Courts,"<sup>1</sup> Calhoun has shown that litigants were not required to hand in their complaints and pleadings in writing until the fourth century.

As a result of our inquiry, then, we find in the forensic speeches of Antiphon, Andocides, Lysias, and Isocrates a studied variety of expression for the commencement of actions, but nothing that may be construed as an allusion to the writing or handing in of pleadings by litigants. But with the advent of Demosthenes new terms make their appearance; we find for the first time ἀποφέρειν and δίδοναι, together with accounts of the actual handing in of the instrument and frequent allusions to the writing of complaints by litigants.

From this state of affairs Calhoun concludes that until shortly before the beginning of the forensic career of Demosthenes complaints and rejoinders were made orally and written down by the magistrate at the instance of the litigant. Struck by the similarity in the history of pleadings and evidence, Calhoun tried to fix more precisely the date of the law requiring written depositions, in the hope of throwing light on the date of written pleadings. He rejects Thalheim's proposal to dispose of ἀνάγνωθι τὴν μαρτυρίαν in Isaeus' fifth oration as an interpolation. He argues:

<sup>1</sup> *TAPA*, L (1919), 189.

. . . the isolated instance of the reading of a deposition in 389 does not justify us in dating the change as early as 390, for there is not the slightest reason why evidence should not occasionally have been presented in writing prior to the enactment of a legal requirement that it be so presented.

Associating the two reforms which required that pleadings and evidence be presented in writing, he fixes upon 378-377 as the most likely date of these important changes.<sup>1</sup> The view that in one speech both kinds of evidence were possible, before the enactment of the law requiring evidence to be in writing, is open to objection. If, as has already been suggested, written depositions were devised by speech-writers in the interest of their clients, one would expect to find uniformity in the method of presenting evidence in individual speeches. As between clients, there might be good reason for using written depositions for one client and oral testimony for another. But it is difficult to see why Isaeus' client needed a written deposition for the first witness when he was able to elicit the testimony of the remaining seven groups of witnesses in the presence of the jury. The proceeding is possible, but not probable. Thalheim's disposal of the phrase *καί μοι ἀνάγνωθι τὴν μαρτυρίαν* as "späteren nach dem vorausgehenden und folgenden *καί μοι ἀνάγνωθι τὴν ἀνωμοσίαν* Zusatz" is to be preferred.<sup>2</sup> All the evidence in the tenth speech seems to be oral. It was delivered during the course of the Theban War (378-371 B.C.). The law requiring evidence to be presented in writing was not in force when this speech was delivered. Thalheim, in selecting 375 as the probable date of the law, was simply striking an average by putting it midway between 378 and 371. Knowing neither the exact date of the speech nor the time that elapsed between its delivery and the enactment of the law, all he could do was to hazard a guess. Calhoun, however, in picking 378-377, is allowing the narrowest margin. The speech is put at the earliest possi-

<sup>1</sup> Calhoun, *op. cit.*, p. 191.

<sup>2</sup> Cf. Hommel, who, in his review of Calhoun's *Oral and Written Pleading* (*Philologische Wochenschrift*, 1923, pp. 612-13), approves of Thalheim's proposal on the basis of a statistical examination of the relative occurrences of *ἀνάγνωθι* and other formulas in the speeches of Isaeus.

ble date, and the law follows it almost instantly. But he has good reason for crowding matters. The archonship of Nausinicus was a notable reform year. Political reforms in Athens tended to come in waves. This feature warrants us in accepting 378-377 as the most likely date for this important judicial reform.<sup>1</sup>

It is perhaps not without significance that written evidence appears first in the speeches of Isaeus.<sup>2</sup> With one exception the extant cases of Isaeus concern estates. They were involved and difficult to present clearly. It may be that he soon realized that the evidence must be carefully formulated and presented in order to be effective. The only certain way to secure this result was to elicit the evidence himself and transcribe it for reading at the proper place. It was a dull method of presenting evidence, but it had the merits of brevity and clarity.

In the fourth century, as formerly, the Areopagus was composed of ex-archons who had successfully passed their audit.<sup>3</sup> Aristotle says that an archon could not take his place in the council at the end of his year of office until he had delivered to the treasurers of Athena the full amount of olive oil due for his year.<sup>4</sup> In addition the Areopagus was subject to an *εἴθυνα* before the logistae. This could only have been at the end of a certain period of time or on the completion of a particular task.<sup>5</sup> The Areopagus could expel any of its members provisionally, but the expulsion became final only on the confirmation of a heliastic court.<sup>6</sup> Athenaeus cites Hypereides to the effect that a man who had been seen dining

<sup>1</sup> Hommel (*ibid.*), while quoting with approval Bonner's earlier statement of the date as being after the end of the public career of Lysias (380 B.C.) and before the bulk of the speeches of Isaeus (375-360), seems to accept Calhoun's closer fixing of the date.

<sup>2</sup> It is not meant that Isaeus was instrumental in having the law enacted, but rather that he inaugurated the new scheme in his own practice.

<sup>3</sup> Pollux viii. 118. For the reputation of the Areopagus during this period, cf. Isocrates vii. 37-39.

<sup>4</sup> *Ath. Pol.* ix. 3.

<sup>5</sup> Aeschines in *Ctes.* 20; cf. Gilbert, *Greek Constitutional Antiquities*, p. 282.

<sup>6</sup> Dein. in *Dem.* 56. 57; Aeschines *op. cit.* 20.

in a public house could not enter the Areopagus.<sup>1</sup> According to Plutarch, the Areopagites were prohibited from writing comedies.<sup>2</sup> Whether these statements are literally true or not, they indicate that the Areopagus preserved its reputation for dignity and uprightness.

The council retained its jurisdiction in cases of premeditated homicide, wounding with intent, poisoning if death resulted, and arson.<sup>3</sup>

At the beginning of the fourth century the Areopagus still had oversight of the sacred olives and continued to have jurisdiction in cases involving them.<sup>4</sup> But sometime during the fourth century the procedure before the Areopagus lapsed, because the state ceased itself to sell the fruit of the olives and began to requisition it from the owners of the farms on which the sacred olives grew. Hence the farmers became liable for a certain amount regardless of what happened to the olive trees.<sup>5</sup> This change took place sometime between Lysias' seventh oration (about 395 B.C.) and the writing of the *Constitution of Athens* (328–325 B.C.).

Various other religious matters came under the jurisdiction of the Areopagus. It appointed the men who managed the sacrifices of the Eumenides.<sup>6</sup> As before, the council had the duty of caring for the consecrated land of the Eleusinian goddesses. In 352–351 B.C. by a popular decree the Areopagus received general oversight of religion for all time, a prerogative which it still retained in Roman times.<sup>7</sup> But general jurisdiction in cases of impiety was restored to the body by Demetrius of Phaleron at the end of the fourth century. Between that time and the reforms of Ephialtes

<sup>1</sup> xiii. 21. 566.

<sup>2</sup> *De gloria Athen.*, 5; Didot, p. 426.

<sup>3</sup> Aristotle, *op. cit.*, lvii. 3; Demosthenes xxiii. 24; cf. Lucian *Anacharsis* 19; Aeschines, *F. L.*, 93; *in Ctes.* 51. 212; Plato *Laws* 877 B. As Sandys says on Aristotle, *ad loc.*, only wounding with intent was classed as φόνος. It was necessary that the poisoning also be with intent. The procedure in the homicide courts described by Aristotle is that of the fourth century.

<sup>4</sup> Aristotle, *op. cit.*, lx. 2; Lysias vii.

<sup>5</sup> Aristotle *Ath. Pol.* lx. 2, 3.

<sup>6</sup> Scholiast on Demosthenes xxi. 115 (cf. lix. 80 f.).

<sup>7</sup> Cf. Keil, "Beiträge zur Geschichte des Areopags," *Berichte über die Verh. der sächs. Akad. d. Wissenschaften* (1919), p. 57.

these cases were, in general, tried before heliastic courts.<sup>1</sup> An interesting example of the participation of the Areopagus in religious matters occurred in 343 B.C. The Delians were contending with the Athenians about the right to administer the temple of Apollo at Delos. The Athenian assembly chose Aeschines, the orator, as their advocate when the case came before the Amphictyonic council, but gave the Areopagus authority to revise the election. The Areopagus rejected Aeschines and chose Hypereides in his place,<sup>2</sup> with the result that Hypereides argued the case.<sup>3</sup>

As the Areopagus became more active after the Peloponnesian War, it played a greater part again in the control of the conduct and morals of the citizens. Apparently the *γραφὴ ἀργίας* came sometimes before the Areopagus and sometimes before a heliastic court.<sup>4</sup> Doubtless the council had charge of the education of the youth only in the sense that it had general supervision of public morals. Public physicians exercised their functions under the control of the Areopagus.

The Areopagus during the fourth century was sometimes intrusted by the people with some special commission of inquiry. The results of this *ζήτησις*, or investigation, were brought before the assembly in the form of an *ἀπόφασις*. The people might deal with the case themselves or appoint prosecutors to handle the matter before a heliastic court. The case of Aeschines, mentioned above, was of this nature. On another occasion it made an investigation as to whether buildings could be erected in the neighborhood of the Pnyx.<sup>5</sup> This was doubtless part of their activity as commissioners of public works.<sup>6</sup> Again, the council was intrusted with investigating the action of Polyeuctus in joining some exiles

<sup>1</sup> Cf. *supra*, p. 258. Cf. Lipsius, *op. cit.*, p. 129. It is interesting to note that Origen (*g. Cels.* iv. 67; v. 20) places Socrates' trial before the Areopagus.

<sup>2</sup> Demosthenes xviii. 134.

<sup>3</sup> Hypereides, *Λόγος Δηλιακός* (*frag.* xix).

<sup>4</sup> Cf. Caillemer, "Areopagus" in Daremberg-Saglio, p. 402. For control of conduct and morals by the Areopagus, cf. Athenaeus iv. 64. 167; Diog. Laert. vii. 169.

<sup>5</sup> Aeschines *Timarch.* 81 ff.

<sup>6</sup> Caillemer, *op. cit.*, p. 403; Heracl. Pont. in Müller, *F.H.G.*, II, 209; Aeschines, *op. cit.*

in Megara.<sup>1</sup> The Areopagus also made an inquiry into the disappearance of part of the stolen money which had been taken from Harpalus, the absconding treasurer of Alexander, and deposited in the Acropolis. The council also investigated the bribing of various citizens by Harpalus.<sup>2</sup>

The council might institute an investigation on its own initiative, but the subsequent procedure was the same. So when the assembly was on the point of discharging Antiphon who was accused of attempting to set fire to the docks, the Areopagus intervened and, after making an inquiry, forced him to stand trial before a heliastic court.<sup>3</sup>

Occasionally the Areopagus was intrusted with independent jurisdiction. Immediately after the Battle of Chaeronea the council tried and condemned to death those who had deserted Athens.<sup>4</sup>

The Areopagus continues to be mentioned up until the fourth century A.D., and under the Romans became again an exceedingly important body.<sup>5</sup> Ex-archons no longer automatically became members, but all of the places were filled by election. The inscriptions show what a great rôle the council played in the government and that it retained all of its erstwhile dignity and prestige.

The fifth-century jury system continued to function to the end of the Peloponnesian War (404 B.C.) without encountering serious difficulties. There is no hint of a shortage of jurors in the Pseudo-Xenophontic *Constitution of Athens* of 424 B.C., nor in the *Wasps* of Aristophanes in 422. Pseudo-Xenophon's<sup>6</sup> suggestion that smaller juries be employed was not intended to make up for a lack of jurors, but to take care of the congestion of litigation which was apparently at its height then, by providing more courts. Indeed, Bdelycleon<sup>7</sup> says explicitly that there were 6,000 jurors; and Andocides, in a speech delivered in 399 B.C., tells of a jury of 6,000 in

<sup>1</sup> Dein. in *Dem.* 58.

<sup>2</sup> Demosthenes xviii. 132 f.

<sup>3</sup> Dein. *op. cit.* 4 ff.

<sup>4</sup> Lycurgus *Leoc.* 52; Aeschines in *Ctes.* 252.

<sup>5</sup> For the privileges and duties of the council in Roman times, cf. Caillemer, *op. cit.*; Philippi, *Der Areopag und die Epheten*, pp. 309 ff.; Keil, *op. cit.*

<sup>6</sup> *Ath. Pol.* iii. 4 ff.

<sup>7</sup> Aristophanes *Wasps* 661-62.

415.<sup>1</sup> This situation did not materially change until after the failure of the Sicilian expedition, with its huge losses,<sup>2</sup> and the permanent occupation of Decelea by the Peloponnesians. In recommending to the Spartans the fortification of a post in Attica, Alcibiades<sup>3</sup> predicted that "the revenues of the Laureian silver mines and whatever they now derive from their land and from their courts" would at once be lost to the Athenians. Moreover, the allies would become careless in paying the tribute, being convinced that the Spartans were now prosecuting the war with vigor. That these expectations were more than realized is clear. Not only did the Athenians suffer great material losses, but the task of guarding the walls required the services of all.<sup>4</sup>

It is in this period that on occasion court sessions were restricted to criminal cases.<sup>5</sup> Suspensions of civil cases were sometimes due to financial as well as to military causes. Similar suspensions in the fourth century are explicitly said to be due to a shortage of funds.<sup>6</sup> The normal population of Athens was greatly increased by the influx of the refugees from the more distant parts of Attica. At the end of the war the country people flocked back to their farms. The city population was much reduced. There was no longer a mass

<sup>1</sup> Andocides i. 17.

<sup>2</sup> For losses in the Sicilian expedition, see Mälzer, *Verluste und Verlustenlisten im griechischen Altertum*, pp. 33-37. He gives both ancient and modern estimates. The highest ancient computation was 40,000. Even victories were costly. Meyer (*Geschichte des Altertums*, IV, 3, 646) estimates the losses at Arginusae at more than 4,000.

<sup>3</sup> Thucydides vi. 91. 7. There is no need to emend *δικαστηρίων* as has been proposed. The scholiast thinks the reference is to τὰ πρυτανεῖα καὶ αἱ χρηματικαὶ ζημίαι. The reference is probably to the loss of judicial revenue due to expected disaffection and revolts among the allies if Sparta took effective measures to crush Athens. Boeckh (*Staatshaushaltung der Athener*, I, 415) thinks of a suspension of court sessions "bei einem einheimischen Kriege." Cf. Lipsius, *op. cit.*, p. 162, n. 91.

<sup>4</sup> Thucydides vii. 27-28: πρὸς γὰρ τῇ ἐπάλξει τὴν μὲν ἡμέραν κατὰ διαδοχὴν οἱ Ἀθηναῖοι φυλάσσοντες, τὴν δὲ νύκτα καὶ ξύμπαντες πλὴν τῶν ἱππέων, κ.τ.λ. (28. 2).

<sup>5</sup> Lysias xvii. 3: ἐν μὲν οὖν τῷ πολέμῳ διότι οὐκ ἦσαν δίκαι οὐ δυνατοὶ ἤμεν παρ' αὐτῶν ἀ ὠφειλον πράξασθαι. ἐπειδὴ δὲ εἰρήνη ἐγένετο ὅτε πρῶτον αἱ ἀστικάι δίκαι ἐδικάζοντο, λαχὼν δὲ πατήρ, κ.τ.λ.

<sup>6</sup> Demosthenes xxxix. 17: καὶ εἰ μισθὸς ἐπορίσθη τοῖς δικαστηρίοις εἰσῆγον ἀνδρῶν οὐκ ἔστιν.

of unemployed refugees available for jury service. Thousands of slaves had deserted.<sup>1</sup> The farmers had enough to do in restoring their dismantled farms<sup>2</sup> without resorting to the city on the chance of obtaining jury service. It must very soon, if not at first, have been apparent that the numbers offering themselves for service were inadequate for the work. True, there was no longer any overseas litigation, but the rule of the Thirty Tyrants must have given rise to considerable litigation in one way or another in spite of the amnesty.<sup>3</sup> Under these circumstances the democratic leaders must have realized that the most pressing need was to make up in some way for the shortage in the supply of jurors without interfering with the efficiency of the courts. The idea of smaller panels to cope with the congestion of the courts had long been familiar to those who concerned themselves about such things. But as Pseudo-Xenophon<sup>4</sup> pointed out in 424 B.C., smaller courts were more easily bribed. And bribery had begun to become serious. There was always more or less of it, but the sensational exploit of Anytus in successfully bribing a whole panel showed that, provided sufficient money was available, the size of the jury was no safeguard.<sup>5</sup> The time was ripe for a fundamental change in the jury system. The panels for certain types of cases were reduced to 200 and 400. The increased danger of bribery was met by a new plan of assigning the sections to the courts daily instead of annually. In this way ten sections could be maintained, though the total number of jurors was considerably below the nominal 6,000. But even so, the numbers did not suffice. A curious system of plural registration was introduced whereby jurors were permitted to register in several sections in addition to the sections to which they were first allotted.

<sup>1</sup> Thucydides vii. 27. 5. Cf. Aristophanes *Clouds* 6-7.

<sup>2</sup> For the thorough devastation of Attica during the Decelean War, see the *Hellenica Oxyrhynchia* xii. 4. Cf. Hardy, "The Hellenica Oxyrhynchia and the Devastation of Attica," *Class. Phil.*, XXI, 346 ff.

<sup>3</sup> Isocrates xviii and xxi.

<sup>4</sup> *Ath. Pol.* iii. 7.

<sup>5</sup> Aristotle *Ath. Pol.* xxvii. Cf. Calhoun, *Athenian Clubs in Politics and Litigation*, pp. 66 ff.; Hommel, *Heliaca*, pp. 127-28.



The evidence for this feature of the new system is found in a passage of the *Plutus* of Aristophanes, which appeared in 388 B.C. Hermes offers to assume various characters in the interests of mortals, if he be permitted to stay among them under the régime that followed Plutus' recovery of his sight. Cario, the slave, in commenting on his ability to be Jack of many trades, says:

ὥς ἀγαθὸν ἐστ' ἐπωνυμίας πολλὰς ἔχειν·  
οὗτος γὰρ ἐξέυρηκεν αὐτῷ βιότιον.  
οὐκ ἐπὶς ἅπαντες οἱ δικάζοντες θαμὰ  
σπεύδουσιν ἐν πολλοῖς γεγράφθαι γράμμασιν.<sup>1</sup>

If the passage be taken literally, it would seem that the practice was common, if not general. It was formerly supposed that Cario was indulging in comic exaggeration by treating a bit of trickery as a regular practice.<sup>2</sup> But this view is no longer held.

The *πινάκια*, or jurors' tesserae, many of which have been found in graves,<sup>3</sup> have been used to support the inference drawn from the passage of Aristophanes that jurors could be registered in other sections than the one to which they were originally allotted. In several cases, in addition to the letter of the owner's section, which is placed regularly in the upper left-hand corner of the *πινάκιον*, there are additional letters in the lower right-hand corner, following the name. For example, *CIA* ii. 877, belonging to Lyson of the deme of Steiria of the A section contains also the letter H after the name. Likewise, *CIA* ii. 887, belonging to Paramonus of the deme of Melite of the Γ section, contains also the letter H. Now, it has been thought by some scholars that the additional letters represent plural registration<sup>4</sup> and that the own-

<sup>1</sup> Aristophanes *Plutus* 1164-67.

<sup>2</sup> Fränkel (*Die attischen Geschworenengerichte*, pp. 97 ff.) disproves Schoemann's view (*De sortitione judicum*, I, 212) that the poet is referring to "einen häufig geübten Betrug." Cf. Teusch, *op. cit.*, p. 50.

<sup>3</sup> All of the extant tesserae are of bronze and belong to the fourth century. They are collected in *CIA* ii. 875-940.

<sup>4</sup> Caillemer, article "Dikastai" in Daremberg-Saglio, p. 189. *CIA* ii. 911, 912, have a curious form of the letter H—H. Some think that the form is a combination of H and E, and means that the owner was entitled to sit in both sections. Cf. Caillemer, *op. cit.*; Bruck, *Philologus*, LII, 420.

er of *CIA* ii. 877, for example, was entitled to sit also with section H in case his own section A was not sitting and section H was not full. The addition of the second letter to the *πινάκιον* obviated the necessity of giving an additional *πινάκιον* to the juror for each section in which he was entitled to sit. There are no examples of two *πινάκια* for the same man with different section letters.<sup>1</sup> That the extra letters on the *πινάκια* have any connection with plural registration has however, been doubted.<sup>2</sup> Bruck suggests that, inasmuch as the *πινάκια* which contain extra letters are in each case reused tablets, the extra letters may be part of the original inscription. That the extra registrations were recorded in a formal and regular fashion is, however, suggested by the perfect, *γεγράφθαι*, of Aristophanes.<sup>3</sup> The plural registrations were, however, doubtless recorded on the different section lists.

<sup>1</sup> There are some examples among the extant tesserae of two struck for the same person. *CIA* ii. 914, 915, found in the same tomb, are practically identical. *CIA* ii. 917, 918, probably found in the same tomb, differ only in that one contains the father's name while the other does not. It has been suggested that the older *πινάκια* omit the father's name, while the later ones have the more explicit designation and more designs. The case of the two just cited, belonging to the same man, seems to disprove this theory. Cf. Caillemer, *op. cit.*, p. 190. It was perhaps not unusual for a man to have additional tesserae struck for himself. Or the original tessera may have been lost and found again after a duplicate copy had been issued by the state. It has been suggested that the tesserae in actual use were all of boxwood and that the extant examples in bronze were struck for the express purpose of being placed in an enthusiastic juror's grave. Cf. Gilbert, *Greek Constitutional Antiquities* p. 397, n. 1. This, however, can hardly be the case, for several of the tablets were obviously used twice. *CIA* ii. 877, 887, 922, 932, 933, show clear traces of another name beneath the present names.

<sup>2</sup> Cf. Lipsius, *op. cit.*, p. 145, n. 33: "Ob aber auf den Richtertäfelchen sich Spuren der aus Aristophanes erschlossenen Tatsache erhalten haben, ist mindestens zweifelhaft." Bruck, *op. cit.*, LII, 419; Mylonas, *Bulletin de correspondance Hellénique*, 1883, pp. 29 ff.

<sup>3</sup> Some of the *πινάκια* are perforated (cf. e.g., *CIA* ii. 876, 899, 924), a fact which has given rise to much speculation. The following suggestions have been made: (1) The perforation was necessary to enable the *ἐμπηκτής* to fasten the *πινάκιον* on the *καρόνις* after it was drawn. Cf. Hommel, *op. cit.*, p. 124. In our utter ignorance of the form of the *καρόνις* this cannot be demonstrated. Many think that the *καρόνις* was no more than a groove into which the *πινάκια* fitted. (2) The perforation was for the convenience of the owner so that he might attach the *πινάκιον* to his garments. Hence some are perforated and some not. (3) The perforation was merely a device for suspending the *πινάκιον* in the grave. Cf. Caillemer, *op. cit.*, p. 190.

The earliest reference to the new jury system is found in the *Ecclesiazousae* of Aristophanes presented in 390 or 388 B.C. In the comedy the state is turned over to the women to manage. Praxagora, the leader of the women, introduces socialism. There is to be no more litigation.<sup>1</sup> The courts are to be abolished.<sup>2</sup> Everybody will own everything. They will live together and eat together.<sup>3</sup> "Where," inquires Praxagora's husband, "will you serve dinner?" "Each court and arcade of the law shall be a banqueting hall for the citizens." The allotment booths are to be used to marshal the citizens into ten groups corresponding to the sections of jurors. These groups, designated by the first ten letters of the alphabet, are to be sent to one or another of the courts which are now to serve as banqueting halls.

τὰ δὲ κληρωτήρια ποῖ τρέψεις ; Πρ. ἐς τὴν ἀγορὰν καταθήσω  
 κῆτα στήσασα παρ' Ἀρμοδίῳ κληρώσω πάντας, ἕως ἂν  
 εἰδῶς ὁ λαχὼν ἀπὶ χαίρων ἐν ὁποίῳ γράμματι δειπνέι·  
 καὶ κηρύξει τοὺς ἐκ τοῦ βῆτ' ἐπὶ τὴν στοιὰν ἀκολουθεῖν  
 τὴν βασιλείον δειπνήσοντας· τὸ δὲ θῆτ' ἐς τὴν παρὰ ταύτην,  
 τοὺς δ' ἐκ τοῦ κάππ' ἐς τὴν στοιὰν χωρεῖν τὴν ἀλφειτόπωλιν.  
 . . . . . Bl. ὅτω δὲ τὸ γράμμα  
 μὴ 'ξελκυσθῇ καθ' ὃ δειπνήσει, τούτους ἀπελῶσιν ἅπαντες.<sup>4</sup>

Praxagora's arrangement for feeding the citizen body is a clever parody of the judicial system. She succeeds in making use of much of the discarded paraphernalia. On the basis of this feature of the comedy a reasonably satisfactory reconstruction of the jury system has been achieved. A number of scholars have contributed to the work. Complete agreement has not been reached, but the conclusions of Lipsius have won general approval.<sup>5</sup>

The number of jurors was still nominally 6,000. All eligible citizens who offered for service were accepted and divided into ten sections in which the tribes were represented as evenly as possible. The first ten letters of the alphabet were used to designate the sections. To each juror was given a bronze tessera with his name and section letter on it. The

<sup>1</sup> Aristophanes *Ecclesiazousae* 657.

<sup>3</sup> *Ibid.* 673-75.

<sup>2</sup> *Ibid.* 677.

<sup>4</sup> *Ibid.* 683-88.

<sup>5</sup> Lipsius, *op. cit.*, pp. 139 ff. Cf. Hommel, *op. cit.*, pp. 115 ff.

courts were designated by the letters from Α to Τ, just as they were in the next period.<sup>1</sup> But, although in the comedy the places that are to serve as banquet halls are named, e.g., ἐπὶ τὴν στοιάν τὴν βασιλείον, ἐς τὴν στοιάν, not designated by letters, there are indications that in the court system which is being parodied letters were used in this period to indicate the courts. Lipsius<sup>2</sup> argues that in the phrases ἐν ὁποίῳ γράμματι and τὸ γράμμα καθ' ὃ δειπνήσει the letter (γράμμα) refers not to the section but to the court. When court sessions were to be held, all sections were summoned. Into a container were put ten tickets with the letters from Α to Κ; into another, the letters Α to Τ designating the particular courts that were to sit that day. A ticket was drawn from each container simultaneously. The section drawn sat in the court drawn. If a court of 1,000 or 1,500 was required, two or three tickets were drawn from the jurors' jar as against one from the jar of the courts. If a smaller court was required, e.g., 200, it was easy to dispose of the excess number by the use of the lot.<sup>3</sup> Under this system of supernumeraries it was always possible to secure a full quota for a jury. Accordingly, at this time a change was made and odd numbers were required for each jury. The court that tried Socrates in 399 B.C. in all probability numbered 501.<sup>4</sup> In the *Plutus*

<sup>1</sup> Aristotle *Ath. Pol.* lxiii.

<sup>2</sup> *Op. cit.*, p. 141, n. 23. Teusch (*op. cit.*, p. 47) believes that γράμματα in these passages always refers to sections of jurors and that names or "signa quaedam," not letters, were used to mark the courts. But evidence that letters were used is the occurrence of Σ on what is generally regarded as one of the allotment σύμβολα used to designate the courts in the process of allotment. Hommel, *op. cit.*, p. 116, n. 293. Cf. Svoronos, *Journal international d'archéologie numismatique*, p. 53, and Plate E. No. 9; Earle Fox, *Revue numismatique*, 1890, p. 63, Plate III, No. 14.

<sup>3</sup> That men were turned away daily from the courts in spite of plural registration is clear from Aristophanes' *Ecclesiazousae*, 687 f. This feature Praxagora proposed not to reproduce in the matter of dining. Hommel (*op. cit.*, p. 119) suggests that for private suits with small panels (200) the country people did not appear. Criminal suits were put on different days to encourage the country people to appear for service when larger courts were required. Evidence for this second allotment on court days is found in Demosthenes xxv. 27, according to Lipsius, *op. cit.*, p. 142, n. 27. Cf. Teusch, *op. cit.*, p. 47.

<sup>4</sup> Plato *Apology* 36 A: εἰ τριάκοντα μὲναι μετέπεσον τῶν ψήφων, ἀπεπεφύγη δν. With a jury of 500 divided into 280 for the prosecution and 220 for Socrates, the change of thirty votes would have resulted in a tie which meant acquittal. With a

of Aristophanes<sup>1</sup> the slave Cario says to the chorus, urging them to be gone,

ἐν τῇ σορῶ νυνὶ λαχὼν τὸ γράμμα σου δικάζειν,  
σὺ δ' οὐ βαδίζεις; ὁ δὲ Χάρων τὸ ξύμβολον δίδωσιν.

Here again is a parody of court procedure. The dicast, on entering the court to which his section was allotted, received a token which entitled him to his fee at the end of the trial. The scholiast regards Χάρων as an anagram for "Ἀρχων."<sup>2</sup>

The change in the size of the courts and the method of assigning panels to the courts belongs to the archonship of Eucleides, 403-402 B.C. Later a further change was introduced. The same men were allowed to remain in the same panel year after year as long as they continued to serve. The annual allotment to sections was confined to the new applicants for service each year. This was the natural thing to do. If all who offered were accepted, there was no need of an annual re-allotment. There was no reason under the new system why a man could not be a life-member of the same section. But all continued to take the oath annually. Some support for this theory is found in the fact that with two exceptions only one tessera (πινάκιον) has been discovered in each grave. This would seem to indicate that the deceased possessed normally only one tessera. Where there

jury of 501 divided into 221 and 280 for the defense and the prosecution, respectively, a change of thirty would have given a majority of one vote for acquittal. Diogenes Laertius (ii. 41) says that the votes against Socrates amounted to 281. If this is correct, Plato's "thirty" must be a round number for thirty-one, and the panel must have numbered 501, divided into 220 and 281. If the reading in Diogenes Laertius is correct—*δτ' οὖν κατεδικάσθη, διακοσίαις ὀγδοηκονταμὶ πλείοσι ψήφοις τῶν ἀπολουσῶν*—this is an example of illogical idiom. Diogenes meant to say that the majority of the jurors voted against Socrates and they numbered 281, or, to put it another way, "281 voted against Socrates, being more than the votes in his favor." There is no evidence for odd numbers in panels in the fifth century. It is not until the fourth century that odd numbers are authenticated. Cf. *supra*, p. 243.

<sup>1</sup> 277-78. The section to which the chorus leader belongs has been allotted to serve beyond the grave, where Charon is in charge just as the magistrates preside at trials. Cf. Van Leeuwen's note, *ad loc.* Several of these σύμβολα mentioned in the text have been found. They are made of lead and have an owl (mark of the 3-obol piece) on one side and a letter on the other. See Gide and Caillemer, *s.v.* "Dikastai," Daremberg-Saglio, for an illustration.

<sup>2</sup> ὁ Χάρων κατὰ ἀναγραμματισμὸν "Ἀρχων λέγεται.

are two, both are for the same section.<sup>1</sup> The practice of plural registration looks like a device suggested by experience in working the new system. It had the double advantage of securing on the spot the required numbers without abandoning the section system, and of utilizing the services of those who were most anxious for employment. This partial disregard for section divisions is a step toward the system of Aristotle's day when jurors were still assigned to sections but allotted to service daily quite without regard to their section affiliations. It affords another example of evolution in the growth of institutions.

The Eucleidean system was still used in 388 B.C., when the *Plutus*<sup>2</sup> was performed. This is the date *post quem* for the newer system. The date *ante quem* is 355 or 354, when the *Areopagiticus* of Isocrates<sup>3</sup> was delivered. Sometime between these two dates the system described by Aristotle was instituted. The point at which a change in the jury system would seem most necessary and desirable is the year of the formation of the new empire, 378-377.<sup>4</sup> Even though the empire was on a more liberal basis, military needs were likely to be pressing and continuous. Keil<sup>5</sup> regarded the decade 380-370 as a period in which establishment of the new league gave Athens the impulse to institute reforms and innovations in the most diverse departments of public life. The changes included the establishment of the *symmories* for the levying and collection of the property tax, the institution of

<sup>1</sup> *CIA* ii. 914 and 915; 917 and 918. Cf. Hommel, *op. cit.*, pp. 120 ff. According to Hommel, the life-tenure of office for the dicast came about gradually owing to the shortage of jurors and the consequent need, in order to man the courts properly, of all who presented themselves for jury service. He places the beginning of the lifelong tenure in the decade following the production of Aristophanes' *Plutus* (388 B.C.) and assigns to this period the unperforated *πινάκια* on the ground that the perforations could not have had the use in this period which they had in the system described by Aristotle—i.e., being fastened on the *καρτοίς*. Cf. *infra*, p. 376.

<sup>2</sup> Cf. 277, 972, and 1166-67.

<sup>3</sup> Sec. 54. Cf. Hommel, *op. cit.*, p. 129.

<sup>4</sup> Dittenberger, *Sylloge*, No. 81; Hicks and Hill, *Greek Historical Inscriptions*, No. 101.

<sup>5</sup> *Anonymus Argentinensis*, p. 266. Keil believes that about 375 B.C. there was a marked increase in the time allotted to litigants for addressing the jury. This development followed naturally upon the perfection of oratory and the use of litigation for political purposes. Cf. Hommel, *op. cit.*, pp. 120 ff.

the *proedroi*,<sup>1</sup> the requirement that litigants should hand in their pleadings and evidence in writing.<sup>2</sup> It would be strange if the reorganization of the jury system were not included among the financial, military, administrative, constitutional, and judicial reforms that followed immediately upon the founding of the second empire in the archonship of Nausinicus.<sup>3</sup> The prospective military commitments of Athens were in themselves sufficient reason for adopting some better means than voluntary plural registrations for making up for the inevitable reduction in numbers of the individual sections that must have been anticipated.

An attempt was made by Bruno Keil<sup>4</sup> to prove that, between the system reconstructed from Aristophanes' *Ecclesiazousae* and *Plutus* and that described by Aristotle, there intervened a system different from either. It began about 375 B.C. and ended, in what he calls "Die Restaurationsjahre," between 347 and 345. It is the novelty of the new constitutional changes that interested Aristotle. Of these the chief was the allotment of the jurors. This is an attractive theory. But the evidence adduced by Teusch, upon which Keil relies, is insufficient. Teusch has treated *κριτής* as a synonym of *δικαστής* in a passage of Demosthenes.<sup>5</sup> The normal meaning of *κριτής* is a judge in a contest of some kind. It never occurs in the orators in the sense of *δικαστής*.<sup>6</sup>

In Aristotle's day the *πινάκια* were no longer made of

<sup>1</sup> Glotz, "L'épistate des proèdres," *Rev. d. études grecques*, XXXIV (1921), 1-19. Cf. S. B. Smith, "The Origin of the Athenian Proedroi," *Proc. of the Amer. Philol. Assoc.* 1927, LVIII, xxiii: "The lapidary evidence shows that the *proedroi* did not exist before 378-7."

<sup>2</sup> Cf. *supra*, p. 360.

<sup>3</sup> Calhoun, "Oral and Written Pleading in Athenian Courts," *Trans. of the Amer. Philol. Assoc.* L (1919), 191 ff. Cf. Hommel, *op. cit.*, p. 129. Lipsius (*op. cit.*, p. 149) refused to commit himself on the date of the introduction of the system described by Aristotle beyond the fact that it was in force in 355 or 354 B.C. (Isocrates vii. 54).

<sup>4</sup> *Anonymus Argentinensis*, p. 267.

<sup>5</sup> Teusch, *op. cit.*, pp. 55-56. Demosthenes xxxix. 10: *φέρε, εἰ δὲ κριτὴς καλοῖτο Μαντίθεος Μαντίου Θορικός, τί ἂν ποιοῖμεν; ἢ βαδίζομεν ἂν ἀμφω; τῷ γὰρ ἔσται δῆλον πότερον σὲ ἐκέληκεν ἢ ἐμέ;*

<sup>6</sup> See Paley and Sandys' notes on Demosthenes xxxix. 10, and Lipsius, *op. cit.*, p. 150, n. 49.

bronze, as in the early fourth century, but of wood.<sup>1</sup> A passage in Demosthenes shows that bronze was still in use in 348 B.C.<sup>2</sup> The need of bronze for coinage was doubtless a factor in the substitution of wood. In 407-406 B.C. the financial straits of Athens forced her to melt down the golden statues of Niké in the Parthenon and issue what Aristophanes in the *Frogs* (720) called τὸ καινὸν χρυσίον.<sup>3</sup> The occupation of Decelea shut off the supply of silver from the mines at Laurium, and bronze coins were used for the small daily needs of the populace until a revival of the fortunes of the city after the victory of Conon in 394 enabled the Athenians to go back to silver as legal tender.<sup>4</sup> A character in the *Ecclesiazousae* complains in comic fashion of the personal inconvenience he suffered by the change. He had just started on a round of the market to purchase supplies when a public crier proclaimed (819-820):

Μὴ δέχεσθαι μηδὲνα  
χαλκὸν τὸ λοιπὸν· ἀργύρῳ γὰρ χρώμεθα.

He was caught with a mouthful of bronze and no silver in the midst of his marketing. A similar crisis arose again in 339 B.C. Recourse was again had to melting down gold ornaments in the Parthenon.<sup>5</sup> Again silver was displaced for daily use by bronze. It was doubtless at this time that wooden tesserae were substituted for bronze to release more metal for coinage.<sup>6</sup>

Aristotle, in his summary of the constitution in his own day, gives an elaborate description of the jury system.<sup>7</sup> The jurors were divided, as in the preceding period, into ten sections designated by the letters from A to K. The sections were approximately equal, and each section contained mem-

<sup>1</sup> Aristotle *Ath. Pol.* lxii. 4.

<sup>2</sup> Demosthenes, *ibid.*; Lipsius, *op. cit.*, p. 150, n. 50.

<sup>3</sup> Head, *Historia Numorum*, p. 373 (2d. ed.).

<sup>4</sup> Aristophanes no doubt reflects popular opinion when, in the *Frogs* 725-26, he refers to these coins as τοῖς πονηροῖς χαλκοῖς and τῷ κακίστῳ κόμματι.

<sup>5</sup> Head, *op. cit.*, p. 375.

<sup>6</sup> Hommel, *op. cit.*, p. 40.

<sup>7</sup> *Ath. Pol.* lxiii ff. For text and translation, cf. Hommel, *op. cit.*, pp. 11 ff. and Colin, *Rev. d. ét. grecques*, XXX, 20 ff.



bers of all ten tribes. When a juror was appointed, he received the *πινάκιον* of boxwood containing his official designation and the name of the section to which he was assigned. The jurors were chosen for particular cases by lot in a very complicated fashion by the nine archons, each for his own tribe, with the clerk of the thesmothetae acting for the tenth tribe. Aristotle mentions, with few details, the courthouse with an entrance for each tribe and two compartments for the drawing of lots for each tribe.<sup>1</sup> These *κληρωτήρια* were equipped with ten chests (*κιβώτια*) for each tribe; other chests to be used in the drawing of lots; two urns (*ύδρίαι*); staves (*βακτηρίαι*); and counters (*βάλανοι*), equal in number to the number of jurors required. The number of jurors needed was determined in advance by the number of courts which were to sit and the number of jurors necessary for each of these courts. The thesmothetae decided by lot which letters were to be used for the courts required for the day. Men to fill these courts were then chosen by lot from all ten jury sections as follows: Each juror brought his *πινάκιον* and cast it into the chest marked with his section letter. Then twice as many were drawn as were needed for jury service on that day. The *πινάκια* thus drawn were attached in some manner to a *κανονίς*. After the requisite number had been drawn, the archon drew dice for the final selection. There were two dice, one black and one white, for each five *πινάκια*. If the archon drew a black die, the first five *πινάκια* from each *κανονίς* were returned to their owners, who were rejected. If he drew a white die, the first five were accepted, and so on in order as he drew the dice. The successful candidates drew each a counter, showed the letter on it to the presiding archon, who at once threw the juror's *πινάκιον* into a chest labeled with the same letter as that on the counter and sent the juror into the proper court with his counter and with a staff of the same color as the court to which he was assigned.

The presiding magistrates were selected by lot by two of the thesmothetae. The first magistrate drawn presided in

<sup>1</sup> For a reconstruction, cf. Hommel, *op. cit.*, diagrams on pp. 140 f.

the first court drawn, and so on. The magistrates then by lot assigned five jurors, one to the superintendence of the water clock and four to the telling of the votes. Five others were assigned to the task of ordering the jurors for the reception of their fees.

Aristotle gives the various amounts of water which were allowed for the pleadings in different types of cases. But in certain types of cases (e.g., cases involving a penalty of imprisonment, death, exile, ἀτιμία, and confiscation) speeches were not limited by the water clock, but each party had a fixed part of the day.

Most courts consisted of 500 jurors, but two or three courts were sometimes combined for important cases. Each juror, after the conclusion of the speeches, was given a perforated ballot and a solid ballot. The perforated ballot was for the plaintiff; the solid for the defendant. The staves were taken up, and in return each juror, as he cast his ballot, received a voucher (σύμβολον) with the letter Γ (i.e., the numeral 3), which he had to surrender when he received his pay. This was to insure that he voted. If he could not show that he had voted, he received no pay. The jurors cast the ballots which they wished to have counted into a brazen urn, and discarded the remaining ballots into a wooden urn. Equality of votes constituted victory for the defendant. If the jury had to determine the penalty, a second vote had to be taken. Afterward the jurors received their pay in the allotted order.<sup>1</sup>

This complicated system was intended to prevent bribery and tampering with the jury in any form. Aristotle indicates in at least half a dozen passages quite explicitly that certain details of the system were devised as a safeguard against dishonest practices.<sup>2</sup>

<sup>1</sup> Colin, *op. cit.*, p. 85 ff. Hommel, *op. cit.*, p. 128.

<sup>2</sup> *Ath. Pol.* lxiv. 2; lxiv. 4; lxvi. 1; lxvi. 2; lxv. 1; lxix. 1. Cf. Hommel, *op. cit.*, p. 128. Colin (*op. cit.*, 85 f.) collects various passages from fourth- and fifth-century literature tending to discredit the jury system. But the faults that are mentioned in these passages are not such as could have been cured by any system of allotment of jurors. In the fifth century the Athenians relied on the size of a panel to prevent corrupt practices. But when they were forced to use smaller panels, they finally devised the intricate system of Aristotle's day.

The importance of the heliastic courts in the Athenian political system can scarcely be overestimated.<sup>1</sup> Aristotle concludes his history of the Athenian constitution by a brief summary of the eleven major constitutional changes which he had described in detail.<sup>2</sup> The eleventh is the democratic restoration after the overthrow of the Thirty. Aristotle characterizes it as follows:

At that time the people, having secured the control of the state, established the constitution which exists at the present day. . . . The democracy has made itself master of everything and administers everything by its votes in the assembly and by the law courts in which it holds supreme power.

The appeal to the dicasterion, introduced by Solon, developed into the supremacy of the dicasts, for the masters of the judicial verdicts became masters of the state.<sup>3</sup>

<sup>1</sup> For the reasons for Athenian litigiousness, cf. Bonner, *Lawyers and Litigants in Ancient Athens*, pp. 96 ff.

<sup>2</sup> *Ath. Pol.* xli.

<sup>3</sup> Cf. *ibid.*, ix. 1; xxxv. 2.

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